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FILED
MAY 13 1958
T. FEY, Clerk

No. 1012

In the United States Court of Appeals For the Seventh Circuit

No. 12185

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. FRED WASHINGTON, Defendant-Appellant.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. Honorable Philip L. Sullivan, Trial Judge.

APPENDIX

DANIEL D. GLASSER
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Chicago 2, Illinois
Attorney for Appellant

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APPENDIX

1

THE UNITED STATES COURT OF APPEALS
For The Seventh Circuit

United States Of America
v.
Fred Washington
District Court #56 CR 398

STATEMENT IN ACCORDANCE WITH RULE 12 (c)

1. This action was commenced by the return of an indictment on June 26th, 1956 by the Grand Jury of the Northern District of Illinois at Chicago, Illinois.

2. The original parties to this action were the United States of America, plaintiff, and Leon Washington and Fred Washington, defendants.

3. The defendant Leon Washington was found guilty and is presently serving his sentence.

4. The defendants furnished bail on the indictment in the sum of $6,000.00 each.

5. On October 5th, 1956, the defendants entered pleas of not guilty to the indictment.

6. On January 8th, 1957, Jury waivers were executed in open court and approved.

7. No questions were referred.

8. On June 6th, 1957, both defendants were found guilty as charged in the indictment.

9. On September 13th, 1957, each defendant committed to the custody of the Attorney General for a period of two years and fined $1.00.

10. Notice of Appeal was filed on behalf of the defendant-appellant, Fred Washington, and he is at large on bail in the sum of $6,000 fixed by the Court.

2 Pleas had at a regular term of the United States District Court for the Eastern Division of the Northern District of Illinois begun and held in the United States Court Rooms in the City of Chicago in the Division and District aforesaid on the first Monday of September, being the 2nd day thereof, in the Year of Our Lord One Thousand Nine Hundred fifty-seven and of the Independence of the United States of America, the 182nd Year.

Present:

Honorable John P. Barnes, Chief District Judge
Honorable William H. Holly, District Judge
Honorable Philip L. Sullivan, District Judge
Honorable Michael L. Igoe, District Judge
Honorable William J. Campbell, District Judge
Honorable Walter J. LaBuy, District Judge
Honorable J. Sam Perry, District Judge
Honorable Win G. Knoch, District Judge
Honorable Julius J. Hoffman, District Judge
Roy H. Johnson, Clerk
William W. Kipp, Sr., Marshal

Friday, September 13, 1957
Court Met Pursuant to Adjournment
Present: Honorable Philip L. Sullivan, Trial Judge

3

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 56 CR 398) * *

Violation: Sec. 4704(a), Title 26, U.S.C., Sec. 174, Title 21, U.S.C.

INDICTMENT

(filed June 26, 1956)

The June 1956 Grand Jury charges:

That on or about June 17, 1956, at Chicago, Illinois, in the Northern District of Illinois, Eastern Division,

Leon Washington and
Fred Washington;

defendants herein, did unlawfully and wilfully purchase from a person or persons whose name or names are to the Grand Jurors unknown, a quantity of a certain narcotic drug, to wit, Four Hundred Eighty-Six (486) grains of heroin, which said heroin purchased by the said defendants, as aforesaid, was not then and there in the original stamped package nor from the original stamped package; in violation of Section 4704(a), Title 26, United States Code.

4 COUNT TWO.

The June 1956 Grand Jury further charges:

That on or about June 17, 1956, at Chicago, Illinois, in the Northern District of Illinois, Eastern Division, the defendants,

Leon Washington and
Fred Washington,

did fraudulently and knowingly receive, conceal, buy and facilitate the transportation and concealment after importation of a quantity of a certain narcotic drug, to wit, Four Hundred Eighty-Six (486) grains of heroin, know-

ing the said heroin to have been imported into the United States contrary to law; in violation of Section 174, Title 21, United States Code.

A True Bill:
Joseph Fr. Kralovec
Foreman.

R. Tieken
United States Attorney.

5 • • •

6

IN THE UNITED STATES DISTRICT COURT

• • (Caption—No. 56 CR 398) • •

Friday, October 5, 1956

Present: Honorable Philip L. Sullivan, District Judge

This day comes the United States by the United States Attorney come also the defendants Leon Washington and Fred Washington in their own proper persons and by their counsel and being arraigned upon the Indictment filed herein against them plead not guilty thereto and it is

Ordered that this cause be and the same is hereby set for trial on November 29, 1956 at 10 A.M.

7

IN THE UNITED STATES DISTRICT COURT

• • (Caption—No. 56 CR 398) • •

Tuesday, January 8, 1957

Present: Honorable Philip L. Sullivan, District Judge

This cause coming on for trial comes the United States by the United States Attorney come also the defendants Leon Washington and Fred Washington in their own proper persons and by their counsel and being informed of their right to a trial by Jury waive a Jury trial in

writing with the approval of the Court and consent of the Government and on motion of the defendants it is

Ordered that this cause be and the same is hereby reset for trial to February 27, 1957 at 10 A.M.

8

UNITED STATES DISTRICT COURT

(Caption—No. 56 CR 398)

WAIVER OF TRIAL BY JURY.

(Filed Jan 8, 1957)

Comes Fred Washington, defendant in the above entitled cause in his own proper person and by Daniel D. Glasser, his attorney, and the defendant, having been advised in open court by the court of his right to a trial by jury, hereby waives that right and consents to a trial by the court without a jury.

Fred Washington
Defendant

Daniel D. Glasser
Attorney for Defendant.

R. Tieken, United States Attorney for the Northern District of Illinois, hereby consents to the waiver by the defendant above-named of a trial by jury of the above-entitled cause.

R. Tieken
United States Attorney
By Harry D. Strouse Jr.
Assistant United States Attorney

Approved:
Philip L. Sullivan
United States District Judge.
January 8, 1957

9

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 56 CR 398) * *

Wednesday, March 27, 1957

Present: Honorable Philip L. Sullivan, District Judge

This being the day to which this cause was continued for further trial again comes the United States by the United States Attorney come also the defendants in their own proper persons and by their counsel and the trial proceeds and at the close of the Government's case the defendants by their counsel enter their motion to suppress evidence which motion is entered and ruling thereon reserved and the defendant Fred Washington by his counsel enters his motion for judgment of acquittal and the Court having heard said motion ruling thereon is reserved and the trial proceeds and at the close of all the evidence the defendant Leon Washington by his counsel enters his motion for judgment of acquittal which motion is entered and this motion with all other motions are taken under advisement and it is

Ordered that the defendants shall file brief in 15 days that the Government shall file its brief 15 days thereafter and that the defendants shall file reply brief 10 days after the filing of the Government's brief and this cause is taken under advisement.

10-11 * * *

12

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 56 CR 398) * *

TRANSCRIPT OF PROCEEDINGS.
(Filed Nov 20 1957)

had in the above-entitled cause before the Honorable Philip L. Sullivan, one of the judges of said court, in his courtroom in the United States Court House at Chicago, Illinois, on March 22, 1957.

Appearances;

Hon. Robert Tieken,
United States Attorney,
By Mr. H. P. Strouse,
Assistant United States Attorney,
appeared on behalf of the Government;
Mr. Daniel D. Glasser
appeared on behalf of the defendants.

---

13 JOHN W. FONNER, called as a witness on the part of the Government, being first duly sworn, testified as follows:

The Court: What is your name?

The Witness: John W. Fonner.

The Court: Where do you live?

The Witness: I live in Oak Park, Illinois.

The Court: What do you do?

The Witness: I am chief chemist for the Alcoholic and Tobacco Tax Laboratory, located in the Main Post Office Building, Chicago, Illinois.

Mr. Strouse: I understand, your Honor, that Mr. Glasser will stipulate he is a chemist.

The Court: All right. I was just going to ask that.

Mr. Glasser: Yes. I know this gentleman very well; I knew him when I was in the District Attorney's Office. He is an old-timer, and I am sure he knows as much about it as anybody can. So, we stipulate to his qualifications.

The Court: Not only that, but do you stipulate that the exhibit is heroin?

Mr. Glasser: No, no.

The Court: Oh, it's not?

Mr. Glasser: I don't know. I am not going to stipulate to that. I only stipulate that they don't have to bother about proving this man's qualifications.

The Court: All right.

Mr. Strouse: Mark these Government's Exhibits 1 and 2 for identification.

(Whereupon two sealed envelopes were marked for identification, respectively, Government's Exhibits 1 and 2.)

Mr. Strouse: I would like the record to show that Mr. Fonner is opening a sealed container which is marked as Government's Exhibit 2 for identification.

Mark these Government Exhibits 3, 3-A, 4-A, 4-B, 4-C and 4-D.

(Exhibits so marked.)

Mr. Strouse: Let the record show that I have extracted therefrom what have been marked for identification as Government's Exhibits 3, 3-A, 4-A, 4-B and 4-C.

Direct Examination by Mr. Strouse.

Q. Showing you Government's Exhibits marked for identification as 1, 2, 3, 3-A, 4-A, 4-B and 4-C, Mr. Fonner, when did you first see those exhibits?

A. I see this is 3.

Q. That is Exhibit 3, yes.

A. And this is Government Exhibit 2?

Q. Yes. The sealed one is No. 2.

A. Government Exhibit 2 was delivered to the laboratory on June 21, 1956.

Q. I think Government Exhibit 2, if I might call your attention to it, is the sealed exhibit which you just opened.

A. Not which I just opened. That is the one that came in first, which contains the rest of the exhibits, with the exception of the rear envelope—oh, Government Exhibit 1, that is the one that came in on June 21, 1956.

Q. Who did you receive that from?

A. That was delivered by narcotic agent Heisig.

16 Q. What did you do with it when you received it?

A. That was entered in an index book. It was given a laboratory number—50,064—50,065. On the outside of that is marked Exhibit 4-A and 4-B, and there were two packages inside, and they gave them two numbers. On the back of it, Government Exhibit 2, was the envelope that I put these other exhibits in after the analysis; and then I gave that the same laboratory numbers, 50,064 and 50,065, and initialed that, and showed the amounts in Government's Exhibit 3 and 3-A.

Q. Have those exhibits, Government Exhibits 1, 2, 3, 3-A, 4-A, 4-B and 4-C been in your custody from the date they were delivered to you by agent Heisig until this morning when you produced them here in court?

A. There is one exception.

Q. What exception was that?

A. That was on the 5th of this month.

Q. On the 5th of March?

A. Yes.

Q. To whom did you deliver them on the 5th of March?

A. Agent Heisig. He brought them either over

17 here to court or—but he brought them back.

Q. Did he return it to you after the 5th of March?

A. Yes, on the same day.

Q. On the same day he returned it back to your custody?

A. Yes, they were untouched.

Q. It was in the same sealed condition when it was returned to you?

A. Yes, that is right.

Q. What did you do with Government Exhibits 3 and 3-A after you opened Government's Exhibit 1 for identification?

A. The first thing I did was to give them these laboratory numbers that I put on the outside of Exhibit 1, that is, namely 50,064 and 50,065. Then I entered in the laboratory notebook the case number and the exhibit number, that is, the narcotic agent's exhibit number; and then I gave the same laboratory numbers; and then I weighed the materials inside of it, and then made an analysis.

Q. What were the weights of Government Exhibits for identification 3 and 3-A?

A. No, 3 weighed 241.1 grains; 3-A weighed 242.4
18 grains.

Q. After you weighed them, what did you then do with them?

A. Well, I ran them both quantitatively and qualitively.

Q. You made an analysis?

A. That is correct.

The Court: What was the result of your examination and analysis?

By Mr. Strouse:

Q. What were the results of that analysis on Government's Exhibit for identification 3?

A. Well, 3 and 3-A, I checked them both qualitatively, and then ran them quantitatively together. Qualitatively they showed the same; therefore I ran them quantitatively together; and when you do it quantitatively there is a considerable amount of work involved, and when they indicated the same—

The Court: What was the result of your examination?

By the Witness:

A. Well, I found that to be heroin hydrochloride; it contained, rather, heroin hydrochloride; and it had
19 11.8 percent heroin alkaloid; I calculated that the heroin hydrochloride there was 13½ percent; in other words, this powder in here was heroin hydrochloride.

Then I checked the other material in there, and they had quinine as an adulterant; there was a slight trace of dormin. Now, as a diluent was a mixture of manito and lactose, that is, sugar. In other words, that was in there in addition to heroin.

By Mr. Strouse:

Q. From what is heroin hydrochloride a derivative?

A. Well, it is derived originally from opium.

Q. Did you place your initials on Government's Exhibits for identification 1, 2, 3, 3-A, 4-A, 4-B and 4-C?

A. I placed my initials on 1, 2, 3 and 3-A. I also did on 4-A, 4-B.

Q. When did you do that?

A. Well, that was done when I opened Exhibit 1. In other words, in No. 1 were all the other exhibits, with the exception of Exhibit 2.

Q. And are those exhibits in the same condition as they were at the time they were received by you,
20 except for the changes that were made during the course of your analysis in the process of making that analysis?

A. They are the same now as they were after I placed the laboratory numbers on, and placed my initials on, and I also had another chemist as a witness, and they are the same writing, and so on.

Now, the only difference is in the amount of material in there. There is less in there now. In Exhibit 3 there are 233.3 grains, and in Exhibit 3-A 233.8 grains of material. The other exhibits have no narcotics in them; that is, Exhibits 4-A, 4-B and 4-C.

Mr. Strouse: I have no further questions.

Cross Examination by Mr. Glasser.

Q. Mr. Fonner, I want to ask you about this amount of heroin hydrochloride that you said was in this package. You said there were altogether 486 grains; or 483.5?

A. Yes.

Q. By the way, how many grains in an ounce?

A. 437½.

21 Q. So that this entire exhibit, including that which is heroin and that which is not, weighed about an ounce?

A. A little over an ounce.

Q. A little over an ounce?

A. That is right.

Q. Then in terms of ounces or in percentage of ounces how much actual heroin was there in this exhibit that you testified to, 3 and 3-A, and that was the total amount of heroin involved in this case?

A. Well, it was 483.5 grains altogether, which is a little over an ounce; and 131½ is a little less than one-sixth of an ounce. Roughly, I would say one-sixth of an ounce.

Q. One-sixth of an ounce of heroin is contained in the big case we have got here, is that right?

A. That is right, approximately.

Q. Approximately one-sixth of an ounce?
A. Yes, I would have to calculate it out.
Mr. Glasser: Well, that is all right. That is all.
(Witness excused.)

22 THEODORE HEISIG, called as a witness on the part of the Government, being first duly sworn, was examined and testified as follows:

The Court: What is your name?
The Witness: Theodore Heisig.
The Court: Where do you live?
The Witness: I live in Hammond, Indiana, sir.
The Court: What do you do?
The Witness: I am a narcotic agent for the Bureau of Narcotics, employed here in Chicago, Illinois.
The Court: How long have you been in that position?
The Witness: Approximately five and one-half years.
The Court: Proceed.

Direct Examination by Mr. Strouse.

Q. Mr. Heisig, calling your attention to the early evening of June 17, 1950, where were you at approximately six forty-five?
A. At approximately six forty-five on June 17, 1950, I was in the second-story apartment of Arnie Kerner,
23 which is located at 4615½ South Drexel Boulevard, Chicago, Illinois.
Q. Who was present with you there in that apartment at that time?
A. Arnie Kerner, Freddie Levy, and two other narcotic agents.
Q. And did you have a conversation?
A. Yes, I did.
Q. After that conversation what happened?

A. A telephone call was place.

Q. Who placed that telephone call?

A. Artie Kernek.

Q. Where was he when he placed the telephone call?

A. In the bedroom.

Q. Where was the telephone?

A. In the bedroom.

Q. Where were you standing with respect to that telephone?

A. I had my ear to the receiver of the telephone.

Q. And did Artie Kernek have her ear to the receiver of the telephone?

A. Yes, she did.

Q Were you in a position to see the number that she dialed on the telephone?

24 A. Yes, I was in a position to see the number she dialed.

Q. What was that number?

A. It was KE 6-6460.

Q. Were you in a position to hear any party who would answer on that telephone?

A. Yes, sir, I was.

Q. Did you hear anyone answer that call?

A. Yes, I did.

Q. Did you recognize the phone at that time?

A. No, sir, I did not.

Q. Did you ever hear that voice again?

A. Yes, I did.

Q. Where did you hear that voice the next time?

A. I heard that voice the following morning in the Bureau of Narcotics Office, Chicago, Illinois.

Mr. Glasser: Your Honor, I would like to interpose an objection to this line of questioning. There is an agent who says he had his ear to the phone and listened to the

conversation, to a voice that he had never heard before; and now he is evidently going to testify that the next day or a few days later he heard the voice again, this
25 was the same voice. Now, this certainly, in my opinion does not come within any exception to any kind of a hearsay rule; and if this kind of testimony should be allowed, it opens the way to too much conjecture, in a case like this, where it is practically conceded, so far as one of the defendants is concerned, there is a circumstantial case, to pile inference upon inference and hope to make a fact, of course, can't be done under our law; and for this agent to engage in speculation, sure, he will say, "I listened to this voice; I never heard it before in my life; there was a short conversation, and sometime later I heard it again, and I knew it was that."

And that goes beyond human experience, if your Honor please.

The Court: No, I think you are wrong, because what difference does it make if he heard the voice before or after, if he knew it was the same voice?

Mr. Glasser: Because our experience is to the effect, if your Honor please, that you don't learn a telephone
26 voice on the telephone by only listening to a few words which may have been spoken; and this is pure conjecture on his part. How many people sound alike? The fact of the matter is—

The Court: That is something I will have to determine; but he may testify.

Mr. Glasser: Okay.

Mr. Strouse: Would you read the last question and answer, please?

(Record read by the reporter.)

By Mr. Strouse:

Q. Who was speaking when you heard that voice again?

A. The defendant Fred Washington.

Mr. Strouse: May the record show that the witness has indicated the defendant Fred Washington in this courtroom.

By Mr. Strouse:

Q. Did you identify that voice as being the same voice you previously heard on the telephone?

Mr. Glasser: If your Honor please—

The Court: I did not hear that question.

Mr. Strouse: I think what I said was a resume of
27 his testimony. Did you identify that voice as being the same voice you previously heard on the telephone?

Mr. Glasser: I object to that question.

The Court: He may answer the question.

By the Witness:

Yes, I did.

By Mr. Strouse:

Q. Now, getting back to this telephone conversation, you testified that you heard a voice answer, is that correct?

A. That is correct.

Q. Were you later able to identify that voice that answered that telephone?

A. Yes, I was.

Q. And that person was who?

A. The defendant, Fred Washington, who is seated immediately behind his attorney.

Q. Did the defendant Fred Washington and Artie Kernek carry on a telephone conversation at that time, and were you able to hear what each party said in that telephone conversation?

A. They did carry on a telephone conversation, and I was able to hear quite clearly what was spoken.

28 Q. What did Artie Kernek say and what did the defendant Fred Washington say?

Mr. Glasser: If your Honor please, I would like to render that objection again to conversations which are outside the presence of this defendant, certainly outside of the presence of the defendant Leon Washington.

The Court: Well, it does not apply at this time, of course, to Leon Washington.

Mr. Strouse: It applied to Fred Washington, your Honor. He was one of the parties to the conversation.

The Court: It applies to the Washington that was on the telephone, but not to the other Washington.

Mr. Strouse: It does not apply to the defendant Leon Washington, no, your Honor.

The Court: All right.

Mr. Strouse: Will you read the last question, please?

(Question read by the reporter as follows:

"What did Artie Kernek say and what did the 29 defendant Fred Washington say?")

By the Witness:

A. Artie Kernek said, "Hello. Is Fred there?"

Fred Washington said, "Yes, this is Fred. Who is this?"

Artie Kernek said, "This is Dee, Baby."

And he said, "Yes."

And Artie Kernek said, "I would like to get a couple; can you get me some?"

And he said, "I can get you a couple."

And then she said, "How long will it take?"

Then he said, "About an hour or so."

She said, "Okay."

And he said, "Okay." And that was the extent of the telephone conversation.

By Mr. Strouse:

Q. What happened after that telephone conversation?

A. Immediately after the telephone conversation?

Q. Yes.

A. I conferred with other agents that were present.

Q. After that, what happened, if anything?

A. Oh, about an hour later, a man came to the apartment.

Q. Do you recall approximately what time that was?

30 A. It was approximately eight thirty, maybe a little before.

Q. Do you recall approximately what time the telephone call was made?

A. Yes, at exactly 7:25 p.m.

Q. Approximately eight thirty, what happened?

A. The defendant Leon Washington came to the apartment.

Mr. Strouse: I would like the record to show that the witness indicated the defendant Leon Washington sitting in this courtroom.

By Mr. Strouse:

Q. Where were you when the defendant Leon Washington came into the apartment?

A. I was in the kitchen.

Q. When did you first see him?

A. I saw him immediately as he came in through the door.

Q. And what happened then?

A. Some of the agents I was with made some noise to make it appear that a door had been broken down.

Mr. Glasser: I object to this. I would like him to tell who made the noise, if he knows.

31 The Court: Yes, if he knows, who made the noise, and what it was.

By the Witness:

A. To my knowledge, Agent Newey made a banging noise on the rear door in the kitchen.

By Mr. Strouse:

Q. What happened then?

A. I burst into the room, and as I did so the defendant threw down—

Q. What defendant, who?

A. The defendant Leon Washington threw down a package containing two packages of heroin hydrochloride.

Q. I show you what has been marked for identification, Exhibits 1, 2, 3, 3-A, 4-A, 4-B and 4-C, and ask you if you have seen those exhibits before?

A. Yes, I recognize these exhibits.

Q. Do those exhibits bear your initials?

A. They do.

Q. And do they bear anything else in your handwriting?

A. Yes, they do.

Q. What else do they have in your handwriting?

32 A. They have a brief account of the circumstances of the seizure of this evidence, as contained on an official Treasury form 150.

Q. You testified that the defendant Leon Washington threw something on the floor; is that correct?

A. That is correct.

Q. Are any of those exhibits something which he threw on the floor?

A. Yes, they both are.

Q. Indicating what exhibits?

A. Indicating these two.

Q. Are they in the same condition they were at the time he threw them on the floor?

A. No, sir, they are not.

Q. What did you do with them after he threw them on the floor?

A. I opened one of the packages and field tested a small portion of the light substance contained. I received a positive reaction from this field test, which indicated to me the presence of a narcotic drug. I used a Marquis

reagent to conduct this test. Later, at the Bureau of Narcotics Office, when I processed this evidence, I took it out of its original containers, which were small brown
33 envelopes, and placed them in the Bureau of Narcotics envelopes. These were in turn, after being properly initialed, placed in this larger envelope, which I delivered to the United States chemist on June 21, 1956.

Q. And were they in your custody from the time you found them on the floor in Artie Kernek's apartment until the time you turned them over to the United States chemist?

A. They were, sir.

Q. And with the exception of the transfer of the powdery substance from the original envelopes to the substitute envelopes, are they in the same condition as they were at the time when your first saw them?

A. Yes, sir.

Q. What happened after you saw Leon Washington—what else happened after you saw Leon Washington throw this package on the floor?

A. I immediately placed him under arrest.

Q. And what happened then?

A. We interrogated him, and asked him from whom he had obtained the narcotic drug.

Q. What did he say?

A. He admitted that the substance was heroin.

Mr. Glasser: To that I object.

34 The Court: What did he say?

The Witness: He said he had gotten it from a man on the street.

By Mr. Strouse:

Q. What else did he say, if anything?

A. He said that he was an addict, and that he was just doing a friend a favor, and that he would get a shot of dope for making this transaction.

Q. What happened then?

A. I went downstairs and contacted two other agents who were outside the premises.

Q. And what did you do then?

A. I told them that we had just arrested—

Mr. Glasser: I object to conversation between him and other agents.

The Court: Well, was one of the defendants there?

Mr. Glasser: No.

Mr. Strouse: I withdraw the question, your Honor.

By Mr. Strouse:

Q. I will ask you what you did then?

A. Went downstairs and met two of the agents.

35 Q. What did you do then?

A. Then I returned to the apartment, and went down to the Police Department with the defendant Leon Washington and Artie Kernek.

Q. And about what time did you arrive at the Police Department?

A. It was approximately 9:30, I imagine.

Q. Did you leave the defendant Leon Washington there?

A. Yes. He was given to the custody of the Chicago Police Department for safekeeping, and delivery to our office the following morning for our usual processing of defendants.

Q. When did you next see the defendant Leon Washington?

A. I saw him the following morning.

Q. Who was he with?

A. At that time he was with Fred Washington and Artie Kernek.

Q. Up in your office?

A. That is right.

Q. Where did you take him from there?

A. From there he was later, I recall, that afternoon
36 he was delivered to the custody of the United States Marshal in this building.

Q. Calling your attention to on or about March 5, 1956, did you have in your possession what have been marked as Government's Exhibits 1 and 2?

Mr. Glasser: You mean 1957.

Mr. Strouse: 1957. I am sorry.

By the Witness:

A. Yes, I did.

By Mr. Strouse:

Q. How did you get those exhibits?

A. I got them from one of the clerks at the United States Chemist's Office, after identifying myself as a narcotic agent, and telling her the evidence was necessary for a court appearance and trial.

Q. What was the condition of Government's Exhibit for identification 2 at that time?

A. It was in a lock-sealed condition in this larger envelope.

Q. What did you do with it?

A. I brought this over—

Mr. Glasser: If your Honor please, we admit the chemist's testimony was about these narcotics. I
37 think he showed after a 24-hour period—

Mr. Strouse: I just want to cover the chain, your Honor.

Mr. Glasser: I have no objection to that.

Mr. Strouse: Then we will stipulate to the fact that throughout the time from when he first had it, it was in the custody of the Government chemist John W. Fonner—

Mr. Glasser: No, I won't stipulate to that. I will only stipulate that the things here testified to so far as the narcotics are concerned are the things which were turned over to the chemist on June 21, 1956. I would like to ask

questions about what happened to it before, but since June 21st I think it is all right. It will save a lot of time.

Mr. Strouse: And has been in the chemist's hands since that time?

Mr. Glasser: Yes. I raise no question about that at all.

38 Mr. Strouse: All right. I have no further questions.

Cross Examination by Mr. Glasser.

Q. I would like to discuss with you, Mr. Heisig, this conversation on the telephone. You said, I think, that the conversation was in a bedroom in the apartment of Artie Kernek?

A. That is right.

Q. And you were in the bedroom as well?

A. That is correct.

Q. Anyone else in the bedroom besides you and Artie Kernek?

A. Yes, one of the other narcotic agents.

Q. You don't remember who it was?

A. Yes. Agent Matera.

Q. Matera?

A. Yes.

Q. By the way, this number KE 6-6460, did you know at that time to whom it was registered, whose phone it was?

A. I knew whose phone number it was supposed to be.

Q. How did you know that?

39 A. Because Artie Kernek told me.

Q. Had you discussed Fred Washington with Artie Kernek?

A. Yes.

Q. As a matter of fact, you told her to call him, didn't you?

A. I suggested that.

Q. You suggested that she call him?

A. Yes.

Q. Now, then she dialed a number, and you had never had any conversation with Fred Washington before, I believe you testified.

A. No, sir; I never had.

Q. I wish we had a telephone here, so we could call Miss Kernek here, so we could see, and you could show the Court how your both ears fitted in that one receiver. Did you have your head right up against hers.

A. Yes.

Q. You heard the entire conversation?

A. I did.

Q. Now, what time of the day was that?

A. That was at 7:25 P. M. that evening.

Q. And what time was it when you first saw Fred Washington subsequent to 7:25 in the evening of the 17th of June? When was that?

A. Would you repeat the question, please?

Q. When, after 7:25 on June 16, 1956, did you hear the voice which you say you heard on the telephone?

A. Well, the following morning.

Q. What time?

A. As I recall, it was sometime before noon.

Q. Sometime before noon?

A. Probably about 10:30 A. M.

Q. And that was in your office?

A. That is correct.

Q. You were convinced, weren't you, that the voice you heard on the telephone was the voice of Fred Washington?

A. I definitely believe it was.

Q. You definitely felt that at the time before he even walked into your office that morning, didn't you?

A. No, sir.

Q. Well, Fred Washington was arrested, wasn't he?

A. Yes.

Q. And wasn't he arrested because you suggested
41 he be arrested?

A. No, sir.

Q. Did you arrest Fred Washington?

A. No, sir, I did not.

Q. Who arrested him?

A. He was arrested by Agents Love and Emerick.

Q. Did you tell them you heard Fred Washington's voice on the telephone, and they should go and arrest him?

A. Yes, I did.

Q. Even though you had never heard Fred Washington's voice before, you ordered his arrest without any further identification?

A. Yes, I did.

Q. So that you were convinced long before you walked into the Narcotics Bureau on that morning that the voice on the phone was that of Fred Washington?

A. No, sir, I was not convinced.

Q. You would not have this man arrested on mere speculation, would you?

A. Well, we—

Q. I did not ask about "we." You ordered the arrest of Mr. Washington?

42 A. I ordered the arrest, but I was not certain that the defendant was the same as the person to whom the phone call was directed.

Q. I say, you were conjecturing, you were speculating, you thought there were so many people in Chicago anyway you might as well throw him in jail and find out tomorrow if he is the right party.

A. We just wanted to find out the truth about this.

Q. Couldn't you have gotten the truth by swearing out a warrant or asking him to come to your office the next morning, or couldn't you have gone to his apartment? With reference to Artie Kernek, where did he live?

A. He lived just an apartment house or so away.

Q. Next door?

A. Approximately.

Q. Couldn't you just as well have gone up and knocked on his door and said, "Will you please come down to our office tomorrow morning?"

A. We could have done that.

Q. Yes. But you didn't want to do it. Do you 43 feel as a police officer that you have a right to invade the privacy of people without a good substantial reason?

A. No, sir, I do not. I felt that—

Q. That is all. There is no question pending, Mr. Heisig. I would like to refresh your recollection, Mr. Heisig. As a matter of fact, didn't you speak to Fred Washington in his cell the night of June 17th?

A. I recall seeing him there, but I don't recall speaking to him.

Q. Well, you did not tell me about that. I asked you when was the first time you saw him after that conversation of June 17th, and you said the next morning.

A. I spoke to him the next morning, but I recall now that I did see him, but I did not speak with him until the following morning.

Q. What did you do, just stand outside of his cell and look at him?

A. I just wanted to see what he looked like.

Q. Because you wanted to identify him at some future day, is that the idea?

A. There was no point in that.

Q. Was this a matter of idle curiosity? Did you
44 just want to go and see what he looked like, to tell your family about it?

A. No, sir. I just wanted to look at him, because he was a person that had been arrested, and he was coming over the next morning. That was it.

Q. You didn't speak to him that night; you weren't interested in what his voice was, were you?

A. I wanted to just look at him.

Q. Just look at him?

A. Yes.

Q. Were you afraid of you heard his voice you might think it was somebody else than that you had heard on the telephone?

A. No, sir. He was in the custody of the Chicago Police at that time.

Q. Well, you were the bailor; you had put him in the custody of the Police Department, hadn't you?

A. Yes.

Q. And he actually was in your custody, and they were giving you a receipt for him?

A. No, sir.

45 Q. Whose prisoner was he?

A. He was in the custody of the Chicago Police Department at that time.

Q. Whose prisoner was he at that time, do you know?

A. He was the Chicago Police Department's prisoner.

Q. Did they prosecute him for any violation?

A. He was being detained and held for the federal authorities.

Q. Who brought him into the Chicago Police Department.

A. Agents of the Bureau of Narcotics.

Q. Were you there when they brought him in?

A. No, sir.

Q. And you said to them at the time, or I suppose they probably said, "Will you please hold this prisoner for us?" I can't understand why you just went in there to look at him. I am not trying to be cute about it at all. It is just beyond my comprehension. This man's voice is the only thing that you had to go by, you had never heard it before in your life, and you had an opportunity first
46 to go next door and knock on the door and say, "Come down to the office," and immediately after the happening, that would have helped you make the identification. You didn't do that. You ordered him arrested instead. Some hours later you had an opportunity to talk to him again, and you didn't do it, but you looked at him. Now, I can't understand that.

A. The answer is very simple. He was in the custody of the Chicago Police Department, and it is our procedure to interrogate all defendants at our office, the Bureau of Narcotics, where we have facilities.

Q. You have never interrogated a witness in the Police Department?

A. Oh, yes, I have.

Q. Yes, and I have been present when Agents do that. Now, let us get back to this cell again. Where was that cell?

A. It was in the men's lock-up, which is, I think, on one of the high floors, maybe the 11th floor of the 11th and State Street Building, in the rear of it. The cell was located just off the interviewing section where the police officials take the information and fingerprint their
47 prisoners.

Q. And when you walked up to the cell, who was with you, or were you alone?

A. There were other Agents there. Agents Newey and Matera, but I don't recall just where they were.

Q. Who was in that cell? Was Fred Washington in that cell alone?

A. As I recall, he was.

Q. As a matter of fact, there were five in the cell at the time, Mr. Heisig—do you remember now?

A. I don't recall.

Q. You don't recall? Well, you wouldn't say there weren't five in the cell, would you?

A. No, I could not say if there were five.

Q. Well, what I want to ask you is this: Since there were five, I am sure there were five in the cell, how did you know which was Fred Washington, because you were alone, and the others were around somewhere else?

A. As I recall, he was pointed out to me by one of the police officers there. I had asked if Fred Washington was there, and he pointed him out.

48 Q. You did not tell us about that before?

A. No.

Q. Have you told us everything you can think of about this whole situation now?

A. There may have been other things that occurred. I have not been asked too many questions.

Q. This testimony you are giving, Mr. Heisig, you have had a chance recently to refresh your recollection on the facts involved in the case, haven't you? You made notes at the time, didn't you?

A. I have my official memorandum which I wrote.

Q. And then you had them transcribed and typed up?

A. Yes.

Q. And you sent a copy of that report to the District Attorney?

A. That is right.

Q. Now, have you had an opportunity to study that in the last few days?

A. I refreshed myself this morning on it.

Q. How long did you study it this morning?

A. Maybe 10 or 15 minutes.

Q. When was the time before this morning that you refreshed your recollection?

49 A. On March 5th, when we had the last trial date and continuance.

Q. Have you talked to any of the witnesses in this case about this case?

A. Yes.

Q. You talked to the Agents, didn't you?

A. Yes.

Q. When did you talk to the Agents about this case?

A. I spoke with them yesterday and this morning.

Q. Well, then, we can say that you also were trying to refresh your recollection yesterday, in addition to this morning.

A. Somewhat.

Q. Right?

A. Yes, sir.

Q. And in your conversation with these Agents you and the Agents discussed your testimony here before the Court this morning, is that right?

A. We discussed what had occurred that night in the seizure of the evidence.

Q. And anything you did not remember, they reminded you of, and anything they did not remember, you reminded them of?

50 A. All of us discussing the thing, naturally, I have a more clear recollection of the procedure.

Q. Well, you made the whole picture, didn't you?

A. I wouldn't say that.

Q. I believe you testified that the defendant Leon Washington told you he was an addict. Do you know whether that is true or not?

A. I am not a doctor. I couldn't pass judgment on that.

Q. Haven't you ever made an arrest of a suspected narcotic addict, Mr. Heisig?

A. Yes, I have.

Q. Well, you did not take a doctor along to determine whether he was an addict, did you?

A. No.

Q. How did you determine he was an addict at that time?

A. Well, they usually suffer withdrawal symptoms the following day, but I have seen some of them go and maybe fool the Agents by acting through the part.

Q. Leon Washington wasn't acting, was he?

A. I don't believe so.

51 Mr. Strouse: I object to this, your Honor.

The Court: Objection sustained.

Mr. Glasser: All right. I withdraw it.

By Mr. Glasser:

Q. Did Leon Washington have any marks on or about his arm?

Mr. Strouse: I object to that.

The Court: Objection sustained.

By Mr. Glasser:

Q. Did you examine Leon Washington to see whether or not in your opinion he was an addict?

Mr. Strouse: I object to that.

The Court: He may answer that.

By the Witness:

A. Yes, I did.

By Mr. Glasser:

Q. Did you discover anything on or about him which might lead you to believe in fact he was an addict?

A. He had certain marks on his body which made me think he was an addict.

The Court: Anything further?

Mr. Glasser: Just a minute.

52 By Mr. Glasser:

Q. Now, in this conversation you had with Leon at the time that you arrested him in the apartment of Miss Kernek, will you relate that entire conversation? By the way, who was present at that conversation?

A. At one time or another Agents Newey, Matera, Emerick and Love.

Q. He came into the apartment, Leon did, at 8:30, I think you testified?

A. Approximately 8:30.

Q. What time was it when you left the apartment with him?

A. It was probably 40 minutes later.

Q. 40 minutes later?

A. Yes.

Q. And during those 40 minutes, you have Newey, Matera, Emerick, and who else?

A. And Love.

Q. And Love. Did you carry on the conversation, did you ask the questions?

A. Not entirely.

Q. Who else asked questions?

A. The other Agents.

53 Q. All the other Agents. Well, now, will you tell us that conversation in its entirety? What was said by you, and what was said by the defendant, if anything, or by any of the Agents to the defendant, and what did he answer in your presence?

A. That would be rather difficult to relate all the questions that were asked, but I do recall, as I mentioned before, that he was asked if he was an addict, and he said yes. He explained how he came over there with this

heroin, he explained how he had obtained it, what he was going to get for it. He explained how he had traveled over to the apartment.

Q. Did you ask him or did he say anything about Fred Washington?

A. The question was asked if he knew Fred Washington, and he admitted that Fred was his brother, as I recall.

Q. Did you ask him anything about Fred Washington? Would it refresh your recollection if you had your notes now?

A. No, sir, I don't think so. I am quite sure it wasn't in my notes.

Q. Well, did you ask him if Fred Washington had
54 sent him, or did you tell him that Fred Washington had sent him?

A. No, sir.

Q. You didn't even ask him about Fred Washington?

A. We asked him if Fred Washington was his brother, and asked him where he got his narcotics from.

Q. What did he say to that?

A. He said he got it off a man; that he did not know the man.

Q. Did you ask him who told him to pick it up from that man?

A. He said the man came to him.

Q. You didn't ask him if Fred Washington had anything to do with this case at all, did you?

A. I did not.

Q. Did anybody in your presence, to your recollection?

A. To the best of my recollection, no.

Q. And you were present during this entire 40 minutes that he was in that apartment being interrogated?

A. Not during the entire 40 minutes. As I recall,
55 I made a telephone call to one of my superiors.

Q. And during the time you were telephoning—

A. I was also talking with Artie Kernek.

Q. So during the 40-minute period you made a telephone call and had conversation with Artie Kernek, so you weren't in the conversation then too long, were you?

A. I was there for most of it.

Q. I would like to ask you now, and I would like you to state either yes or no: Did you or did you not ask him, or tell him, that Fred Washington had sent him, and what did he answer to that question or statement?

A. No, sir, I did not ask him that question.

Q. And you did not hear it asked in your presence by any of the Ag nts?

A. To my recollection, no.

The Court: Is that all?

Mr. Glasser: That is all.

The Court: Anything further?

Mr. Strouse: Yes, your Honor. I have a couple of things I would like to ask.

56 *Redirect Examination by Mr. Strouse*

Q. I think you answered a question on cross-examination that you told Artie Kernek to make a telephone call to Fred?

A. I suggested it to her.

Q. What was the basis of that suggestion?

A. Well, she had told me that he was her source of supply; he was the person that was supplying dope.

Mr. Glasser: Now, your Honor, I object.

The Court: Sustained.

Mr. Strouse: Your Honor, he raised the point as if Artie Kernek was ordered to make a telephone call to a particular individual, and all I want to clarify is the grounds of the reason why—

The Court: Yes, but he is going into conversation now. Sustained.

Mr. Strouse: I have no further questions.

(Witness excused.)

57 GROVER A. PETERSON, called as a witness on the part of the Government, having been first duly sworn, testified as follows:

The Court: What is your name?

The Witness: Grover A. Peterson.

The Court: Where do you live?

The Witness: 5124 North Winchester Avenue.

The Court: What do you do?

The Witness: I am supervising special agent of the Illinois Bell Telephone Company.

Direct Examination by Mr. Strouse.

Q. How long have you been with the Illinois Bell Telephone Company?

A. 35 years.

Q. And you are here in response to a subpoena duces tecum?

A. Yes.

Mr. Glasser: If your Honor please, if they are attempting to prove that this Kenwood number—let us have a statement of what they intend to prove with this man, and we can probably stipulate.

The Court: All right.

58 Mr. Strouse: I intend to prove, your Honor, that this Kenwood number, KE 6-6460, on or about June 17th was installed in the apartment on the second floor at 4627 South Drexel Boulevard; that the phone had been installed on February 20th; and that it was a nonpublished or silent phone. I would further by this witness show

that the only way you could get the telephone number of this particular phone was to get it from either the owner of the phone or someone to whom he had given it, but could not get it through the telephone company.

Mr. Glasser: I am ready to stipulate to everything except this last—"you can't get it from the telephone company."

Mr. Strouse: I will say, no one can call the telephone company per se and get this phone number.

Mr. Glasser: You admit an agent can get that listing, if he wants to.

Mr. Strouse: Only on a subpoena.

Mr. Glasser: That is right. One of those Grand Jury subpoenaes.

59 Mr. Strouse: Yes, that is right.

Mr. Glasser: You just walk over and hand them a post card and say who is this listed as? If that is understood, why—

Mr. Strouse: The only other thing I want to show that there is a non-publish agreement signed by Della Washington, and the phone was listed under Della Washington, and if that is stipulated to—

Mr. Glasser: Yes. I am stipulating that the phone, but I don't stipulate that every time Della Washington's phone was answered it was answered by Fred Washington.

Mr. Strouse: No, I am not asking for that.

Mr. Glasser: We so stipulate.

Mr. Strouse: I also, your Honor, by this witness put in Exhibits 5, 7 and 8, which are the non-publish agreement, which is what makes it a private phone, and the installation ticket of the Bell Telephone Company, which shows the date the phone was installed, and a change ticket which shows the date on which that particular

60 telephone they gave a new number.

Mr. Glasser: I object to the introduction of these exhibits because they relate to Della Washington who is not a party to this lawsuit.

The Court: Well, you have already stipulated, haven't you?

Mr. Strouse: He has stipulated to all the evidence.

Mr. Glasser: I have stipulated to the fact that Fred Washington lives in this apartment and has the telephone Kenwood 6-6460.

The Court: And subscriber was Della?

Mr. Glasser: And that the phone subscriber was Della.

Mr. Strouse: And that this was the same apartment that Fred Washington lives in.

The Court: Whatever that number is.

Mr. Glasser: Introducing the contract with the telephone company—

Mr. Strouse: This is only for the record, to show that —I withdraw the offer.

The Court: All right.

61 Mr. Strouse: Thank you very much, Mr. Peterson.

(Witness excused)

The Court: Call the next.

Mr. Strouse: Marion Burr.

Mr. Glasser: Tell us what you are going to do with Marion Burr.

Mr. Strouse: I want to hurry this up.

Mr. Glasser: We do too. We can't finish today. These witnesses that are merely technical things, we could get out of the way.

Mr. Strouse: Marion Burr, if called to the stand, would testify, your Honor, I would expect him to testify, that the apartment on the second floor south, 4627 South Drexel, was rented to Della and Fred Washington, who were living there as husband and wife, and they were the

only persons living in that apartment to his knowledge, on June 17, 1956; that the rent was paid by either one of those parties on various occasions.

Mr. Glasser: I am afraid I can't stipulate. I can stipulate that they rented the apartment, but I can't stipulate that they were the only ones that lived there.

62 Mr. Strouse: I am talking about June 17th.

Mr. Glasser: I wish you would just ask him.

Mr. Strouse: Well, at any rate, you will stipulate that Fred and Della Washington lived in that apartment on June 17th, and that Fred Washington is a defendant in this case?

Mr. Glasser: Yes, but I also think that others were living in that apartment at that time.

The Court: I don't think that is of any consequence.

Mr. Glasser: Well, it might be. Whoever answered the telephone might become important.

Mr. Strouse: I would like to use the witness to show they were the only people officially living there, your Honor.

The Court: This witness, if he testified, would testify as far as he knew they were the only people?

Mr. Glasser: Is that right? Is that what you would testify to?

Mr. Strouse: That on June 17th, as you know, that Fred and Della Washington were the only people that lived in that apartment at 4627 South Drexel?

The Witness: There was another couple living there.

Mr. Strouse: I am sorry. I understood they were

63 the only couple living there.

The Court: Well, that ends that then.

Mr. Strouse: Yes, sir.

The Court: Call the next.

GEORGE EMERICK, called as a witness on the part of the Government, having been first duly sworn, testified as follows:

The Court: What is your name?

The Witness: George Emerick.

The Court: Where do you live?

The Witness: 1752 South 63rd Street, Milwaukee, Wisconsin.

The Court: What do you do?

The Witness: I am a Federal narcotics agent.

The Court: Proceed.

Direct Examination by Mr. Strouse.

Q. Mr. Emerick, calling your attention to on or about six forty-five in the evening of June 17th, where were you?

A. I was in the vicinity of 4615½ South Drexel Boulevard, in Chicago, Illinois.

Q. And you say in the vicinity. Do you remember exactly where you were at approximately six forty-five?

64 A. Well, at about six forty-five I was in the building at 6415½.

Q. Whereabouts in the building?

A. In the apartment on the second floor.

Q. Do you know to whom the apartment belonged?

A. Yes, Artie Kernek.

Q. Who else was present at that time?

A. At that time there was Artie Kernek and Freddie Levi, and Agent Heisig.

Q. Freddie who?

A. Another fellow, I believe his name was Freddie Levi, Agent Heisig, Agents Matera, Love, Newey, and myself.

Q. Did you have a conversation at that time?

A. Yes, I did.

Q. After that conversation, what happened?

A. A phone call was made.

Q. Who made the phone call?

A. Miss Kernek.

Q. What did you do then?

A. After the phone call had been placed and the conversation was taking place, I left the apartment in company of Agent Jack Love.

Q. Where did you go?

65 A. We went to our car, which was parked on the west side of Drexel Boulevard.

Q. Headed which direction?

A. Headed south.

Q. Is that a parkway street?

A. Yes, sir, it is.

Q. And has a park down the middle, is that right?

A. Yes.

Q. You were headed south?

A. Yes.

Q. What happened then, if anything?

A. I would say Agent Love and myself were in our car for about 10 to 15 minutes.

Q. What happened then?

A. At which time we saw the two men here, Fred Washington and Leon Washington, across the parkway, and enter a 1956 Cadillac, green in color, with a cream top.

Mr. Strouse: May the record show that the witness indicates the defendants, Leon and Fred Washington, in the courtroom.

By Mr. Strouse:

Q. And what did you do then?

66 A. We then entered the car and drove south on Drexel Boulevard, and we followed them by a circuitous route to the vicinity of 62nd and Eberhart where the car was parked for a short time. At that time, at that

point Agent Love left the car and I circled the park; and when I returned, I would say in a matter of several minutes, I picked up Agent Love, and we followed this same car back to the vicinity of, on Drexel between 46th and 47th Streets.

67 Q. Where did this car park?

A. It parked then on the east side of the street, heading north on Drexel Boulevard.

Q. Where did you park?

A. I passed the car at that time, and went down, to about the second street, where I could cross over, and made a U-turn, came through the parkway; and came up and parked again between 46th and 47th on Drexel Boulevard, heading south.

Q. What happened then?

A. At that time Leon Washington left the car, and he walked across the parkway, and up 46th Street. We were parked somewhere near the middle of the block there. As he left my view, I got out of the car and walked up to the corner, and saw him enter an old green car, I believe it to be a Pontiac, and he drove away. The car was parked on the north side of 46th Street, headed west.

Q. What did you do then?

A. I returned to my car and left that vicinity, and returned, I would say, in a matter of five or ten minutes.

Q. And what happened then?

68 A. When we returned to the vicinity, Agent Love and myself, I would say within a matter of five minutes, Agent Heisig came from the building at 4615½ Drexel, and told us that they had made an arrest.

Q. About how long a time had elapsed from the time you walked out of the apartment when the telephone call was in progress to the time Agent Heisig came out and had the conversation with you?

A. I would say that the entire time was just about one hour.

Q. What did you do then?

A. After we were informed of the arrest of Leon Washington, Agent Love and myself went several areas looking for Fred Washington, and we found him as he was parking his car on 31st Street near Indiana; and he was arrested at that point at about, I would say, 9:00 or 9:15 P. M.

Q. Did you place him under arrest?

A. Yes, sir.

Q. Where did you go then?

A. We drove the car to the vicinity, and took Fred Washington down to police headquarters.

Q. Did you leave him there?

69 A. Yes, sir, we did.

Q. When did you see the defendant Fred Washington next?

A. The next morning, sir.

Q. Where did you see him at that time?

A. That was in the office of the Bureau of Narcotics in the New Post Office Building in Chicago.

Q. And did you ask him certain questions or have a conversation with him at that time?

A. I was present, sir, when questions were asked of him.

Q. Do you remember what questions were asked and what answers he gave?

A. Yes. He was asked questions concerning his age, where he lived, his birthday, and things of that nature.

Q. Where did he state he lived?

A. If I recall correctly, he said he lived at 4627 Drexel Boulevard.

Q. And did he state his marital status?

The Court: Did he state what?

Mr. Strouse: Whether he was married or single.

70 By the Witness:

A. Yes. I believe he said he was married.

By Mr. Strouse:

Q. Did he give you the name of his wife?

A. Yes. Della Gardner, I believe.

Mr. Glasser: I don't like to interrupt foolishly, but it is very dangerous to keep on leading the witness. This is not an important question, but it gets people into bad habits.

Mr. Strouse: I am sorry, your Honor.

The Court: Do you remember any of the rest of the conversation?

The Witness: Yes. I recall he was asked where he lived.

The Court: You have stated that.

The Witness: Whether or not he had any brothers or sisters; and he mentioned, as well as I recall, one brother and one or two sisters, and a phone number.

By Mr. Strouse:

Q. Do you recall the phone number?

A. Yes, it was Kenwood 6-6460.

Q. Did you have a similar conversation or were

71 you present when a similar conversation was had with the defendant Leon Washington?

A. Yes, sir, I was.

Q. What was the conversation?

A. It was on the same basis again, sir. He said he resided, as well as I could recall, at 4645 South Evans Avenue; that he was unmarried; and he gave a phone number, as well as I recall, Atlantic 5-5414. He said he was addicted, and he was asked where he obtained his narcotics, and he said from various street peddlers. We asked about his relationship, about his brothers and

sisters, and he mentioned he had a brother, and again, I believe, one or two sisters.

Mr. Strouse: I don't have any further questions, your Honor.

The Court: You may go until Tuesday morning.

Mr. Strouse: Will we continue the subpoenas outstanding until Tuesday morning?

The Court: That is right, until Tuesday morning.

Mr. Glasser: If your Honor please, may we have
72 a direction to all of the Agents who are witnesses that can be communicated with by the Assistant District Attorney, that none of them are to talk with each other about their testimony in this case?

The Court: I have already made that statement.

Mr. Glasser: Over the weekend. I would like to be sure.

(Whereupon the further hearing of this matter was continued to 10:00 o'clock A. M., Tuesday, March 26, 1957.)

73

IN THE UNITED STATES DISTRICT COURT
* * (Caption—No. 56 CR 398) * *

10:00 o'clock a.m.
March 26, 1957,

Hearing resumed.

Present:

Hon. Robert Tieken,
United States Attorney,

By: Mr. H. P. Strouse,
Assistant United States Attorney,
appeared on behalf of the Government;

Mr. Daniel D. Glasser,
appeared on behalf of the defendants.

And thereupon the following further proceedings were had herein:

74 GEORGE EMERICK, a witness on the part of the Government, having been heretofore duly sworn herein, resumed the stand and testified further as follows:

Cross Examination by Mr. Glasser.

Q. Mr. Emerick, when you were testifying the other day, you testified that you arrested Fred Washington. Is that right?

A. That is right.

Q. On what day was that when you made the arrest?

A. June 17, 1956.

Q. What time of the day was it?

A. It was around 9:00 or 9:15 p.m.

Q. Who was with you when you made that arrest?

A. Agent Jack Love.

Q. And where were you?

A. At the corner of 31st and Indiana Avenue, in Chicago, Illinois.

Q. Were you in an automobile?

A. Not at the time of the arrest, no.

Q. And did you both place this man under arrest at the same time, or did one of you walk up to him alone, or what happened?

75 A. We both approached the car perhaps at the same time, one from either doorway.

Q. What side of the car did you go to?

A. As well as I recall, I was on the driver's side.

Q. Who was driving?

A. Fred Washington.

Q. Anybody else in the car?

A. Yes, another gentleman.

Q. What was his name?

A. I don't recall offhand, sir.

Q. Did you arrest him?

A. We talked to him, sir.

Q. Did you arrest him? I asked you.

A. I said we talked to him. We asked his name.

The Court: No. He asked you if you arrested him.

The Witness: Well, at the time I would say we did.

By Mr. Glasser:

Q. Well, you can answer that yes or no, can't you, Mr Emerick?

A. Yes. I said at that time we did.

Q. Did you arrest him?

76 A. We did.

Q. Where did you take him?

A. Nowhere. He was released right there.

Q. You mean you have the power to arrest and release, too? Is that a part of your powers?

Mr. Strouse: Objected to, your Honor.

The Court: Sustained, to the form of the question.

By Mr. Glasser:

Q. Do you think, Mr. Emerick—you have the power of arrest, you feel, don't you?

Mr. Strouse: Objected to.

The Court: He may answer.

By the Witness:

A. I do, yes.

By Mr. Glasser:

Q. Do you feel that you also have the power to release after arrest?

Mr. Strouse: Objected to.

The Court: He may answer.

By the Witness:

A. Not necessarily, sir.

By Mr. Glasser:

Q. Not necessarily, but in this case you exercised 77 that authority, didn't you?

A. That is right.

Q. Tell me why you arrested this man?

Mr. Strouse: If I may interrupt, I see that one of the witnesses has been in the court room, and there has been a motion to exclude. I have her under subpoena.

Mr. Glasser: Oh yes. I am awfully sorry. You will have to wait in the witness room.

The Court: All right, go ahead.

Mr. Glasser: Will you read the last question, Mr. Reporter?

(Question read by the reporter as follows:

"Q. Tell me why you arrested this man?")

Mr. Strouse: Objected to. I don't see where this other individual, who is not charged in this case case fits in, where that is material or relevant as to the arrest of this particular defendant Fred Washington.

Mr. Glasser: I think it is very relevant to this case; and if I can go along, I think I can show where it is relevant.

78

The Court: Proceed.

By Mr. Glasser:

Q. What was the cause of your placing him under arrest?

A. For one reason, for our own protection, sir.

Q. For your own protection?

A. Yes.

Q. Did you search him?

A. I don't recall at the time if we did or not, sir. We saw the identification. He produced that.

Q. Well, now, you were talking about your own protection. What you had in mind was that he might have some instrument on or about him or his body, by which he could do violence to either of you; isn't that right?

A. That is right.

Q. But you did not see fit to search him to see whether he had such instrument or weapon?

A. I said I didn't recall about it. At the same time with the arrest of this man Washington, this man was in close proximity to Agent Love, and his movements were watched very carefully by Agent Love.

79

Q. Would you say Agent Love placed him under arrest, then, or did you?

A. Well, if he was placed under arrest, Agent Love would have done so.

Q. Well, now, just a minute—"if he was"— you have already testified that he was. Who placed him under arrest, did you?

A. I told you, sir, I was on the driver's side and I arrested Fred Washington.

Q. You did not arrest this man that was with Fred Washington?

A. No, I did not.

Q. So that when you said you did, that was a mistake?

A. I don't recall that I did.

Q. You said he was arrested.

A. Yes.

Q. What was his name?

A. I said I didn't recall.

Q. Oh, you don't recall that either. Now, let us go to the arrest of Fred Washington. How did that come about? What did you do? You were sitting in your 80 car, you said?

A. As to the arrest, sir?

Q. Yes, I want to go now to the point of the arrest of Fred Washington. Let us get in back of it a while. You were in a car, were you not?

A. Well, what time, sir? When?

Q. Well, you arrested him, you said, at 9:30 in the evening.

A. I said at 9:00 or 9:15.

Q. Where were you at five minutes to nine or ten minutes after nine?

A. At the time I arrested Fred Washington, sir, I was alongside of his car, as he was leaving his car.

Q. Where were you a few minutes before you got up to his car? Were you in a car of your own?

A. Yes, drove into the neighborhood.

Q. That is what I am talking about. Had you followed Fred Washington's car to that neighborhood?

A. No, we had not.

Q. Where was this arrest made, at what address?

A. 31st and Indiana Avenue, Chicago, Illinois.

Q. Now, when before the time of that arrest did
81 you meet Fred Washington?

A. When did I meet him?

Q. Yes.

A. I had never met him.

Q. You had never met Fred Washington?

A. No, I had not.

Q. I believe you said Fred Washington and Leon Washington both emerged from their home shortly after you emerged from the apartment of Miss Kernick, is that right?

A. They emerged from an address on Drexel Avenue, yes.

Q. Shortly after, and you were watching them?

A. Yes, sir.

Q. And you followed them?

A. That is right, sir.

Q. And then Leon and Fred, you said, went some place, and then they came back, and Leon got out of the car, and proceeded up some street, and got into a green Pontiac?

A. That is right, sir.

Q. That is what you said?

A. Yes.

Q. Did anyone follow Leon Washington after he
82 got into that green Pontiac?

A. As well as I recall, as I said in my testimony, we attempted to, and we were blocked and could not follow.

Q. How much time elapsed between the time you saw Leon get into the green car and the time when Agent Heisig came out to tell you that he had made an arrest?

A. Well, from the time that I observed Leon enter this green car, to the time I was advised by Agent Heisig that an arrest had been made, that time I would say was about fifteen minutes. However —

Q. No, that is the only question that is pending. I appreciate you want to help me, Mr. Emerick, but let us do it my way.

Now, the green car that Leon entered was how far from the apartment of Ardie Kernick when you last saw it?

A. It was on 62d Street, one block west of Drexel Boulevard, so it was one block plus the entire distance of the parkway, to her apartment. I would say, possibly, ordinary city blocks, at least two Chicago city blocks.

83 Q. When you saw Leon drive away in that green Pontiac, what did you do?

A. I was at the corner of 62d and Drexel at that time. I came back to our car with Agent Love.

Q. Where was your car at that time?

A. It was parked on Drexel Boulevard, heading south.

Q. At what address?

A. It was between 46th and 47th on Drexel Boulevard.

Q. Approximately across the street or on the same side of the street as the apartment that Ardie Kernick lived in?

A. Somewhere in that neighborhood, I don't recall.

Q. Pretty close?

A. Yes, pretty close; across the parkway, however.

Q. But you were observing that house, waiting for Agent Heisig, weren't you?

A. No, not at that time. We were not observing the house. We were observing Fred and Leon Washington; but Leon had gone one way and Fred another way.

84 We came back to the car and we left the neighborhood, attempting to follow Leon, and we were obstructed in traffic.

Q. Oh. Well, you didn't tell us that you attempted to follow Leon Friday.

A. As well as I recall, I did.

Q. No, you didn't. Here is what you said:

"As he left my view, I got out of the car and walked up to the corner, and saw him enter an old green car, I believe it to be a Pontiac, and he drove away. The car was parked on the north side of 46th Street, headed west.

"Q. What did you do then?

"A. I returned to my car and left that vicinity, and returned, I would say, in a matter of five or ten minutes.

"Q. And what happened then?

"A. When we returned to the vicinity"—

The Court: That is a matter of argument.

Mr. Glasser: All right. I just wanted to refresh his recollection, that is all.

85 By Mr. Glasser:

Q. You were parked in front of Ardie Kernick's house, or across the street from it, for how long, did you say, ten or fifteen minutes before Heisig came out and told you he had made an arrest?

A. I said about ten minutes.

Q. About ten minutes?

A. Yes.

Q. Had you seen Leon Washington enter that house?

A. No, I had not.

Q. Now, getting back to the arrest of Fred Washington, you said you had never met him.

A. That is right.

Q. And when you stopped him, did you ask him his name?

A. I may have. I don't recall what I asked him at the time.

Q. Well, when you make an arrest in an investigative case, you make a report of that, don't you, Mr. Emerick?

A. Yes, we do, sir?

Q. Have you studied your report lately?

A. I refreshed my memory prior to the trial.

86 Q. Well, you refreshed it even this morning, didn't you?

A. No, I did not.

Q. You were sitting on the bench. Who were you talking to on the bench?

A. I wasn't talking to anybody.

Q. There was somebody sitting next to you, wasn't there?

A. Agents Heisig and Love were sitting there.

Q. Somebody had a report in their hands?

A. It may have been there.

Q. You did not notice it?

A. No, I did not.

Q. When was the last time that you went over your report?

A. Prior to this trial, sir; I think Thursday afternoon.

Q. Does your report contain a conversation you had with the defendant at the time you arrested him?

A. It may or may not. I don't know, sir.

Q. Well, have you got a bad memory, Mr. Emerick?

A. No, I haven't; I don't think I have.

87 Q. And you say you just a few days ago looked at your report, and now you can't recollect the conversation you had with this man Fred Washington, whom you didn't know?

A. I don't think I said I did not know Fred Washington.

Q. Had you ever met him before?

A. No, I had never met him before.

Q. Did you make no reference in your report to your conversation with Fred Washington at the time you arrested him?

A I don't recall that, sir.

Q. You don't recall any such conversation?

A. No, I don't.

Q. As near as you can recall, what was your reason for arresting Fred Washington?

A. Because of certain admissions, and the results of observations and surveillance, I thought we had sufficient probable cause to make an arrest.

Q. Certain admissions by whom?

A. By the Agents present, and also by Ardie Kerniek.

Q. Certain admissions by the Agents present? What do you mean, admissions? You mean statements, don't you?

88 A. That is right.

Q. Certain statements. Well, Heisig had told you to go over and arrest him?

A. No, he had not, sir.

Q. Well, now, he is mistaken if he testified that he did?

A. I don't know if he is or not.

Q. Well, then, you are mistaken if he isn't; isn't that right?

A. Fred Washington was arrested because of the observation and surveillance, and the activity that had taken place prior to this delivery, sir.

Q. This observation and this surveillance, and all this stuff you are talking about, is that of your own knowledge?

A. Certain things that happened in the apartment are in my own knowledge.

Q. What were those things that happened in the apartment that made you think Fred Washington was guilty?

A. The conversation with Ardie Kernick, after which she made the telephone call, saying whom she was calling.

Q. Ardie Kernick said who she was calling?

89 A. Yes.

Q. And therefore, you went and arrested Fred Washington?

A. That is right.

Q. Was that the only evidence on which you arrested Fred Washington?

A. And I say, the surveillance and observation of Fred and Leon leaving their apartment.

Q. You said Fred and Leon left their apartment together.

By the way, is there any possibility that Fred and Leon did not leave together, that Fred left with somebody else?

A. No, there is no possibility.

Q. No such possibility?

A. Not at that time of the day, as I testified to, no.

Q. If it is proven that Fred Washington did not leave the apartment with Leon that day, but left with somebody else, then I suppose you will admit you were wrong?

A. No, sir, I will not admit.

Q. You won't admit you were wrong?

A. No, sir, I will not.

90 Q. And you feel as positive about the rest of your testimony, as about the fact that Fred and Leon both left the house together on that day?

A. I am positive that Fred and Leon left the house at that time of the day.

Q. Together?

A. Together.

Q. And they got in the car together?

A. That is right.

Q. And you are just as positive about that as you are about the rest of your testimony?

The Court: You have already asked him that.

By the Witness:

A. I am positive about that, sir.

By Mr. Glasser:

Q. When you stopped Fred Washington, did you have a warrant with you for his arrest?

A. No, sir, I did not.

Q. Did you know whether or not any warrant had ever been issued for his arrest?

A. No, I did not.

Q. Did you observe Fred Washington in the violation of any law at that time?

91 A. At the time of the arrest?

Q. Yes.

A. No, I did not.

Q. How many times before the time you arrested Fred Washington had you seen him?

A. I don't know, sir. It could have been — I would say, at least five times, maybe many more times.

Q. Well, it could have been five, but many many more times? Couldn't you tell that? Don't you know about that?

A. I don't know how many times I have seen Fred Washington since I have been in Chicago.

Q. You saw him in connection with the investigation of a case, I assume, didn't you?

A. Not necessarily.

Q. Well, did you meet him socially?

A. I told you, sir, I never met the man.

Q. Well, I am trying to understand about when you saw him, and how you saw him. You said you saw him many times.

A. I observed him on many occasions at various places. I was aware of who Fred Washington was.

Q. How were you aware of that? How did you 92 become aware of that?

A. How did I become aware of who Fred Washington was?

Q. Yes.

A. Because I had heard various things about Fred Washington.

Q. Well, then, you could have heard a lot about me. My name is Dan Glasser, and yet not know who I am.

A. I never heard anything about you, sir.

Q. You know about Abraham Lincoln, but you never met him.

A. That is right.

Q. How did you learn about Fred Washington? Who told you about him?

A. Through anonymous phone calls, and from other people whom we had arrested for narcotic violations.

Q. Well, if you get an anonymous phone call, do you go out and make an arrest without investigation?

A. No, sir.

Q. Now, the indictment in this case, Mr. Emerick, charges in two substantive counts — there is no conspiracy count here — that Fred Washington purchased some narcotics. Did you see him purchase any narcotics?

A. No, sir, I did not.

Q. In the second count he is charged with knowingly receiving, concealing, buying, and facilitating the transportation. Did you see him do any of those things?

A. No, I did not, sir.

Q. So that actually you, yourself, did not observe Mr. Washington in the violation of any law at any time. Is that a fair statement?

A. No, it isn't, sir.

Q. Tell me about the law that you saw him violate?

A. I would say the evidence here, sir, is

Q. Well now, you are not going to decide the evidence.

A. No, that is right, sir; I am not attempting to.

Mr. Glasser: That is all.

Mr. Strouse: If we are going to get into the question of probable cause for the original arrest, I have a
94 number of other things I would like to ask this witness, because I think a different type of testimony is admissible in that kind of a hearing than now. I don't know what counsel is starting in on. Otherwise, I have no further questions.

The Court: Well, I take it — probable cause — if a man is guilty, that is one thing; if he is not guilty, that is another thing.

Mr. Strouse: We are talking about his arrest, for which he was heard before the Commissioner. He was here on a bench warrant. But at the time we started this trial, counsel reserved the right to raise questions from time to time as evidence might be adduced. I don't have any questions in my case in chief that I wish to ask this witness, because there has been nothing raised since then.

The Court: Well, then, if you don't have, why, call the next.

95 Mr. Strouse: All right.

JACK E. LOVE, called as a witness on the part of the Government, being first duly sworn, testified as follows:

The Court: What is your name?

The Witness: Jack E. Love.

The Court: Where do you live?

The Witness: Sheridan Road, Chicago.

The Court: What do you do?

The Witness: Employed by the United States Treasury Department, Bureau of Narcotics, as a narcotics agent.

The Court: How long have you been there?

The Witness: Approximately six years.

The Court: Proceed.

Direct Examination by Mr. Strouse.

Q. Agent Love, calling your attention to the night of June 17, 1956, where were you about 6:45 in the evening?

A. I was with the other Agents, Heisig, Newey,
96 Emerick and Mattera, at 4615-½ Drexel Boulevard, in Ardie Kernick's, apartment.

Q. Was there a conversation at that time?

A. Yes, there was.

Q. After the conversation, what happened?

A. After Agents Heisig and Matter had talked to Ardie Kernick, she placed a phone call which was monitored—

Q. Just what happened.

A. She placed a phone call.

Q. What did you do then?

A. About half way—well, about a minute or two—a few seconds after the phone call was started, and the person answered at the other end, Agent Emerick and I left the apartment.

Q. Where did you go?

A. We went across Drexel Boulevard to the west side, towards 46th Street, and sat in our car.

Q. And what did you do then?

A. Well, we at there for approximately five, six or seven minutes. We were observing Fred Washington's apartment.

Q. And that was what address?

A. That was 4627, just a few doors south of Ardie
97 Kernick's apartment.

Q. Where were you parked?

A. We were on the west side of Drexel Boulevard, a fer carlengths from the corner of 46th Street, facing south on Drexel Boulevard, and behind Fred Washington's Cadillac, 1956 Eldorado Cadillac.

Q. What happened then, if anything?

A. Well, as I started to say previously, about five, six or seven minutes, we observed Fred Washington and Leon Washington come out of their apartment and cross Drexel Boulevard to their car and get in their car.

Q. What did you do then?

A. As the car pulled away from the curb, we followed it south to the vicinity.

The Court: Who were in the car, did you say?

The Witness: There was Fred Washington and Leon Washington in the Cadillac.

The Court: All right.

By the Witness:

A. (Continuing) We followed it south, oh, going criss-cross different streets, to the neighborhood of about the 6200 block on Eberhardt.

98 By Mr. Strouse:

Q. And what did you do then?

A. I got out of the car that Mr. Emerick was driving, and conducted a surveillance on foot, and I observed Leon Washington get out of the Cadillac—the car was double-parked—and he went into a building. In a few minutes he came back out of the building with a third man, and they got back into the Cadillac that Fred was driving, and proceeded back to the vicinity of Fred's apartment. They parked the Cadillac on the east side of Drexel Boulevard close to the entrance of their apartment at 4627 Drexel. Agent Emerick and I proceeded up to 46th Street, and resumed our position, almost identical with what it was before we had pulled away.

Q. Now, the Fred Washington and Leon Washington that were in that Cadillac car on the 17th of June, 1956, do you see them in the court room today?

A. Yes, I do.

Q. Will you indicate them, please?

A. Leon Washington is sitting behind defense counsel, in a leather jacket, and Fred Washington is sitting there in a gray suit.

Mr. Strouse: I would like the record to show that that witness had identified the two defendants in this case.

By Mr. Strouse:

Q. After you parked you car on the east side of Drexel Boule ard, facing south, what happened then?

A. I observed Leon Washington coming sort of catercornered across Drexel Boulevard through the parkway, up towards where Agent Emerick and I were parked. It appeared as though he was going to walk almost directly to our car. At that point, as he went by our car, the rear of our car, and at the corner stepped into the 46th Street, and was proceeding east on 46th Street, Agent Emerick got out of our car to conduct surveillance, and I slid over behind the wheel. Agent Emerick came back in a very few seconds, and said Leon got into an old beat-up Pontiac. I backed up across 46th Street, and proceeded to go east on 46th Street, but just as I did, something happened in the middle of the block, and there was a squad car and a lot of commotion, and I could not get through, and I then backed out of 46th Street onto Drexel Boulevard, and looked over to see the Cadillac, and the Cadillac had gone.

Q. What did you do then?

A. Then I started to look for the Cadillac and the Pontiac together.

Q. What happened then?

A. Well, in about ten to fifteen minutes we came back to 46th Street and Drexel, just south of 46th Street; and Agent Heisig—we saw Agent Heisig standing outside, and he came over and told us that Leon Washington had just been arrested in Ardie Kernick's apartment.

Q. What did you do then?

A. I then told Agent Heisig that Agent Emerick and I would try to find Fred Washington as soon as possible in the car.

Q. Did you find the defendant Fred Washington?

A. I did.

Q. About what time?

A. Well, it was very close to nine o'clock, a few minutes before or after.

Q. Where did you find him?

101 A. On the corner of 31st and Indiana Avenue, as he was pulling up across the street from Ida May's Lounge.

Q. What happened there?

A. I introduced myself to Fred Washington, and reached in and took the car keys, and frisked him, looked at his identification. Then because of the commotion caused on the corner there, because it is quite busy there in the evening, I pulled the Cadillac up around the corner, and parked it on Michigan; and rejoined Agent Emerick and Fred Washington in the Bureau car, and we talked then.

Q. Who was with you when you went up to the car where Fred Washington was?

A. When I went up to the car, I was alone, but Agent Emerick was sitting right behind it.

Q. Did all of this that you have testified about happen in the City of Chicago, in the Northern District of Illinois?

A. Yes, it did.

Q. When did you next see the defendant Fred Washington?

A. I saw him the following morning at the office
102 of the Bureau of Narcotics, 817 New Post Office Building.

Q. Who was present at that time?

A. Agent Emerick, Agent Mattera, and Agent Heisig.

Q. Was there a conversation between the defendant Fred Washington and the other people that were in the room?

A. Yes, there was.

Q. And did you have a conversation yourself with the defendant Fred Washington?

A. Yes, I did.

Q. What did he say to you and what did you say to him at that time?

Mr. Glasser: Who did you say were present at that conversation?

The Witness: Well, Agents Heisig and Emerick, and Mattera was in the finger print room.

By Mr. Strouse:

Q. What did you say to him and what did he say to you?

A. Well, after he was photographed and his fingerprints taken, there is a form that is called a personal history sheet, relative to his personal history, such 103 as brothers and sisters, and I took that information from him in regard to that, his address, and telephone number, and work, everything that would be considered personal history.

Q. Did he give his address?

A. Yes, he did.

Q. What was the address?

A. At that time he said his address was 4627 Drexel, Apartment 2-S, I believe.

Q. And his telephone number?

A. Was Kenwood 6-6460.

Q. Did he mention any brothers or sisters?

A. Yes, he said that he had a brother Leon, and a sister, I believe.

Q. Was there any conversation?

Mr. Glasser: Just a minute. I would appreciate if counsel would not lead the witness. Ask him what conversations there were, and don't lead him.

By Mr. Strouse:

Q. What other conversation was there?

A. Well, I asked him if he was married and if he lived with his wife, if he was employed, how long
104 he was employed. I asked him who he associated with, and asked about his relationship with Ida May's Tavern, 31st and Indiana; and I asked him about the car, the 1956 Eldorado he was driving, how much he paid down and everything, and he answered all those questions for me.

Q. What answers did he make to those questions?

A. He said that he was unemployed; that he hadn't worked for a period of about six years. He said he was 37 years old. He said his wife was Della Gardner, that lived with him at 4627 Drexel, and the phone number was naturally the same. He said that he had part interest at one time in Ida May's corner, he had lent money, had part interest in Ida May's Corner, but he lost it, so he didn't have any interest in it at that time. And he said the 1956 Eldorado he got from a car dealer on the South Side whose name is Nathaniel Spurlock, and he paid $400—

Mr. Glasser. I object to that.

The Court: Yes.

Mr. Strouse: I wasn't interested in that conversa-
105 tion, but counsel put me in a position where I had to ask for the whole conversation.

By Mr. Strouse:

Q. Did you that morning have a conversation with the defendant Leon Washington?

A. I did.

Q. Who was present?

A. Oh, Agent Heisig and Agent Emerick that I am positive of.

Q. And where were you at that time?

A. In our office, 817 New Post Office Building.

Q. Did he give his address?

A. Yes, he did.

Q. What was his address?

A. 4645 Evans.

Q. And his telephone number?

A. Atlantic 5-5414.

Q. Did he mention any relatives, brothers or sisters?

A. He did.

Q. Did he mention Fred Washington?

A. He did.

Q. Did he give you Fred's address?

A. Yes, he did.

106 Q. What address and phone number did he give for Fred Washington?

A. 4627 Drexel; phone number Kenwood 6-6460.

Mr. Strouse: I have no further questions.

Cross Examination by Mr. Glasser.

Q. Agent Love, I understood you in part of your testimony to say that while you were in Kernick's apartment that as soon as someone on the other end answered, you left the apartment?

A. I believe, sir, I said as soon as the conversation had started.

Q. So, as soon as the conversation started, you and Emerick left the apartment?

A. Yes, sir.

Q. Did you have any particular place in mind that you were going to when you left the apartment?

A. Oh, very definitely.

Q. Where were you going?

A. Going over to our car, to conduct surveillance of Fred Washington's apartment.

107 Q. That was as soon as the conversation started; that was your job?

A. Yes.

Q. You and Emerick?

A. That is right.

Q. As soon as you got word that the other phone answered, you and Emerick were to leave the apartment, and put under surveillance the apartment of Fred Washington, is that right?

A. Not as soon as somebody on the other end said, "Hello," or something like that, but as soon as the conversation.

Q. Sometime during the course of the conversation?

A. Yes, that we were satisfied.

Q. That you were satisfied. So, you went out to observe the apartment of Fred Washington?

A. Yes, sir.

Q. How far was Fred Washington's apartment from Kernick's apartment? Is it next door?

A. I don't believe it is next door.

Q. Two doors away?

A. It is either two or three doors away.

Q. What is Kernick's address?

108 A. At that time it was 4615-½ Drexel Boulevard.

Q. Where was Fred Washington's apartment?

A. 4627 Drexel.

Q. And you introduced a new man into the case. You said when Fred and Leon drove out to 62d Street, I believe, they got out of the car, and then a third person was with them.

A. That is correct.

Q. Is that right?

A. That is my recollection.

Q. That is your recollection?

A. Yes.

Q. Do you know now who that third person was?

A. No.

Q. Did that third person drive away in the car with Fred and Leon Washington?

A. Do you mean from down on 62d?

Q. Yes.

A. Yes, he did.

Q. Did he get out at any time at any place between 62d and Fred's home, or was he with them when Leon got out of the car?

A. I believe he was with them.

109 Q. He was with them?

A. Yes.

Mr. Glasser: Will you get Joe Guster from the witness room? I want to see if he is the third man. Just call him in, that is all. I just want you to stand up a moment. Can you see this man?

The Court: What is his name?

Mr. Glasser: What is your name?

Mr. Guster: Bill Guster.

By Mr. Glasser:

Q. Is that the man that you say you saw get into Fred Washington's car?

A. I cannot truthfully say.

Q. You cannot truthfully say?

A. No.

Mr. Glasser: All right. That is all, Mr. Guster. You wait out there.

By Mr. Glasser:

Q. When you left the Kernick apartment, you got into your own car, is that right?

A. Yes.

Q. How long were you sitting there before you
110 saw Fred and Leon Washington come out of the apartment?

A. Well, it was, I would estimate, a period between five and ten minutes at the very most, ten minutes at the very outside.

Q. Had you ever met or spoken to either Fred or Leon Washington before that time?

A. I never had spoken to them, but I knew them.

Q. Were they pointed out to you by somebody, is that the idea?

A. I had known Fred Washington for almost four years by sight.

Q. By sight? But you had never spoken to him?

A. Never.

Q. How about Leon?

A. I had known Leon, oh—

Q. Did you know him by sight?

A. Yes.

Q. Just by sight; you never met him or had any conversation with him?

A. No.

The Court: How long have you known him?

The Witness: Your Honor, I would say about
111 two and a half of three years.

By Mr. Glasser:

Q. Now, when Fred and Leon and this third party drove back to in front of their apartment, Leon got out, and Agent Emerick followed him, and came back and said he got into a beat-up green Pontiac?

A. I never said a green beat-up Pontiac. I think he said it was a green Pontiac, that is all.

Q. Then you started driving around, looking either for the Cadillac or the Pontiac?

A. No, sir, I did not.

Q. What did you say?

A. I said when Agent Emerick came back and got in the car and said Leon had gotten into this older Pontiac, I backed up across 46th Street instead of going to 47th—I didn't want to take that time. I backed up over 46th north, and I pulled into 46th Street, trying to follow Leon in that Pontiac.

When I started up 46th Street, there was a squad car sitting up at Cottage Grove, the next street west of Drexel, and there were a lot of people around there,
112 and I couldn't get through. Then I backed out of 46th Street, and went back on Drexel, and I looked across for the Cadillac, and it had gone. That is when I started to look for the Pontiac and Cadillac.

Q. I thought you said something about looking for the Pontiac and Cadillac, but I didn't have the right sequence. Then you had no luck, I assume, in finding either of them, is that it, at that point?

A. No, sir.

Q. Then you came back and put yourself in the vicinity of the Kernick and Washington homes?

A. That is correct.

Q. Then you say that when you came back there, drove up there, you saw Agent Heisig waiting for you outside?

A. Agent Heisig was outside.

Q. Was outside?

A. Yes.

Q. And you had a conversation with him?

A. I did.

Q. And you said that he told you that Leon Washington had been arrested?

A. That is right.

113 Q. What else did you do?

A. He said they were going to take him down to 11th Street.

Q. Did he mention the name of Fred Washington to you?

A. Oh, definitely.

Q. What did he say about Fred Washington?

A. He wanted to know if I knew where he was.

Q. Well, now, during the course of the conversation on the telephone, you left. You don't know whether she was talking to Fred Washington or not. You don't actually know it?

A. Whether who was talking—

Q. Whoever was talking to Fred Washington.

A. I was told that was Fred. That was all I know.

Q. Who told you it was Fred?

A. Ardie.

Q. She picked up the telephone, and when he answered, she said, "This is Fred"?

A. No, it did not happen that way.

Q. How did it happen?

A. When she dialed the number, Agent Heisig and Agent Mattera were monitoring it.

114 Q. Mattera was also monitoring it? What do you mean, did they have a tape recorder?

A. No, just listened to it.

Q. Agents Mattera and Heisig were both listening?

A. That is right.

Q. Was Mrs. Kernick listening also?

A. Yes.

Q. So all three were listening?

A. Yes.

Q. Did they have any extra receivers?

A. They were in the bedroom.

Q. Were you in the bedroom?

A. I was.

Q. You saw all three of them standing with their heads together, listening to that conversation, is that right?

A. I did.

Q. When did you find out they were talking to Fred Washington?

A. After he started to talk, it was either Agent Heisig or Agent Mattera, put their hand over the telephone, and said, "Is this Fred?"

And Ardie said, "Yes," and the conversation continued.

115 Q. Then you left?

A. That is about when I left.

Q. Now, I would like you to describe the scene of the arrest. I believe you testified you went up to the car while Emerick sat in back of the steering wheel. Maybe I didn't get that right. Will you tell us about that?

A. I had just come out of Ida May's tavern. I was looking for Fred. Agent Emerick was sitting on the southeast corner of Indiana and 31st, on Indiana, facing north.

Q. He was in a car, was he?

A. He was in a car. As I came out, he was out on the sidewalk, and he hollered across, and he said, "There is Fred's car. There is Fred's car."

I turned around and looked, and it was Fred's car, sitting on 31st Street; and I ran across the street, and while I was running across the street, Agent Emerick pulled up. I identified myself to Fred, told him to get out of the car.

Q. You got up to the car—this was that Cadillac?

116 A. Yes.

Q. What side of the car did you go to?

A. I came up on the driver's side.

Q. On the driver's side?

A. Yes.

Q. Anybody else in the car besides Fred?

A. Yes.

Q. Who was there?

A. A little man, with a little mustache.

Q. Did you identify yourself to defendant Washington?

A. Sure, I did.

Q. What did you say to him and what did he say to you, if anything?

A. Well, I had my badge in my hand. Of course, he was upset, wanted to know what it was.

I told him, "I am a narcotic agent."

Q. Did you have your gun in your hand?

A. Did I have a gun in my hand?

Q. Yes.

A. I may have had it in my coat pocket. I don't think I had it in my hand.

Q. Well, what was that conversation?

A. I said, "Turn off the ignition, and get out of 117 the car."

He wanted to know why I was arresting him.

I told him something like, I said, "You know what just happened, Fred, as well as I do."

So he turned the motor off and I took the keys, and he got out of the car.

Then there was a crowd of people gathered around.

Q. Where was Emerick during these proceedings?

A. Emerick was right there besides me.

Q. Beside you?

A. Yes.

Q. What about this other fellow?

A. We had him, shook him down too.

Q. What do you mean, shook him down—you searched him?

A. I patted him for weapons and things like that.

Q. He was standing outside of the car, next to Fred Washington?

A. We had them separated just a little bit.

Q. Which one were you with, and which one was
118 Emerick with?

A. Emerick was standing with this other fellow. I was with Fred. Then I went over to the little fellow and then Mr. Emerick went over to Fred Washington.

Q. Who was that little fellow? What was his name?

A. Well, I can't remember his exact name, but this fellow that was just in here looked an awful lot like him.

Q. What was your conversation with that fellow?

A. I wanted to know what he was doing in the car, if he was employed. To the best of my recollection, he showed me identification that he worked for the Ford Aircraft, or some motor company, but I am not positive on that; and he convinced Agent Emerick and I that he was clean, and that he was a friend of Fred's, and had nothing to do with this thing that happened previously in the evening.

Q. Did you ask him any questions about that?

A. I sure did.

Q. What were your questions, and what were his answers?

119 A. Well, I asked him if he ever used narcotics. He said no.

I made him roll his sleeves up. I asked him if he ever sold narcotics.

He said no.

I asked him if he had a record. I believe he said he had been picked up for gambling or stuff like that. I am not just clear on that.

I said, "Did you ever have any dealings with Fred with narcotics?"

He said, "No."

I said, "With Leon?"

He said, "No."

Oh, and what convinced me to let him go was his identification of working, because he said we could get him any time. So I did not take him in that time.

Q. Well, as a matter of fact, you were out that night only for one purpose, and that was to arrest Fred Washington; wasn't that your principal purpose in going to Ardie Kernick's home, having that conversation, suggesting the telephone call—this whole business—wasn't that principally because you wanted to arrest Fred Washington?

120 A. Not to my knowledge; no, sir.

Q. You weren't out that night to arrest Fred Washington?

A. No, sir.

Q. You weren't there for that purpose at all?

A. No, sir.

Q. All right. Why, then, did you arrest Fred Washington?

A. Under the circumstances, after we got to Ardie Kernick's apartment.

Q. You didn't hear the conversation between Fred and anybody else, did you, if it was Fred? You didn't hear that conversation yourself, did you?

A. No. I told you that.

Q. The indictment charges that Fred—and this is all it charges—it charges that Fred Washington purchased some narcotics on that day. Did you see Fred Washington purchase any narcotics on that day?

A. No, not to my knowledge.

Q. Well, he did or he didn't? Did you see him purchase any narcotics?

A. Not to my knowledge he didn't, no.

121 It is also charged that he did fraudulently and knowingly receive, conceal, buy and facilitate the transportation and concealment after importation of nar-

cotics. Did you see him do any of those things on that day? You don't like to answer, "No," do you; you would rather answer, "Yes"?

A. I don't know whether he did or not.

Q. Well, would you rather say yes or no?

A. Well — no.

The Court: Well, you didn't see him?

The Witness: No. I can't say yes.

Mr. Glasser: You didn't see him. That is what we want.

By Mr. Glasser:

Q. There is just one question I want to ask you, Mr. Love. You say when Leon got out of the car he walked diagonally across the street to 46th, almost past your car; you thought he was coming to your car?

A. Yes, sir.

Q. Then he got in his car, Agent Emerick told you, and he drove east, is that right?

A. Yes.

122 Q. Then you did not see him any more?

A. No, sir.

Q. Can you tell us about 46th Street? There is a parkway in the middle of Drexel there, isn't there?

A. Yes, sir.

Q. You were sitting on the west side of the street, were you?

A. Yes, I was.

Q. So that if he was driving east and drove completely across the street, he would be driving in front of you?

A. I made a mistake. He was going west. I made a mistake. I am sorry. He was going west.

Mr. Glasser: That is all.

(Witness excused.)

The Court: Call the next.

123 GEORGE MATTERA, called as a witness on the part of the Government, being first duly sworn, testified as follows:

Mr. Glasser: Well, now, in the interest of expedition, I am sure we will have the same situation with this fellow as we have had with the others. I would be willing to stipulate, only to expedite this thing, generally to the effect that if this fellow were asked the same questions as were asked of Agent Heisig, both on direct and cross examination, his answers would be substantially the same.

Mr. Strouse: All right. I think there is only one other thing I would ask this witness that I am not sure I asked Agent Heisig.

Mr. Glasser: I better withdraw my stipulation.

Mr. Strouse: Let me tell you what it is. One thing is whether everything he testified to took place in
124 the city of Chicago, in the Northern District of Illinois.

The Court: You have no objection?

Mr. Glasser: I have no objection, and will stipulate they have proven venue.

Mr. Strouse: The other is the containers, that is, Exhibits 3 and 3-A, whether they were in the original stamped containers, or whether they had revenue stamps on them.

Mr. Glasser: Then I will have to ask him one question, too. I was interested in impeachment.

The Court: All right.

Mr. Strouse: Why don't we stipulate with that exception, and you can ask him the question.

Mr. Glasser: All right.

125 *Cross Examination by Mr. Glasser.*

Q. Were you in the apartment of Ardie Kernick on the day when this arrest of Leon Washington was made?

A. Yes, sir, I was.

Q. Were you present when the telephone call was made?

A. Yes, sir, I was.

Q. In what room of the apartment was it made?

A. Made in the bedroom.

Q. Who was in the bedroom at that time?

A. Agent Heisig and Ardie Kernick.

Q. Anybody else?

A. I don't believe there was anyone else present.

Q. You, yourself, were not in the bedroom?

A. Yes, sir, I was.

Q. Oh, you were in the bedroom?

A. Yes.

Q. Oh, I understood you to say just the two of them.

A. No. I am sorry.

Q. Were you present when the telephone call was made?

126 A. Yes, sir.

Q. What were you doing during the time that telephone call was being made?

A. I watched Ardie Kernick dial the telephone number, and then the telephone was tilted over so we put our ears to the telephone, sir.

Q. Did you put your ear to the telephone receiver?

A. Yes.

Q. Anybody else put their ears to the telephone receiver?

A. Agent Heisig did.

Q. Did anybody else?

A. Ardie Kernick.

Q. So all three of you were listening in on the telephone conversation?

A. Yes, sir.

The Court: Anything further?

Mr. Glasser: That is all.

(Witness excused.)

127 • • •

128

IN THE UNITED STATES DISTRICT COURT

• • (Caption—No. 56 CR 398) • •

March 27, 1957,
10:00 o'clock a.m.

129 • • •

130 ARDIE KERNICK, being first duly sworn, testified as follows:

The Court: What is your name?

The Witness: Ardie Kernick.

The Court: How do you spell the last name?

The Witness: K-e-r-n-i-c-k.

The Court: Where do you live?

The Witness: 4615½ Drexel Boulevard.

The Court: 4658?

The Witness: 4615½.

The Court: Are you employed?

The Witness: Yes, I am.

The Court: Where?

The Witness: State-Lake Theatre.

The Court: What doing?

The Witness: Matron.

The Court: Proceed. Let the record show this witness is called as the court's witness.

Mr. Glasser: And our objection is noted?

The Court: That is correct.

131 *Direct Examination by Mr. Strouse.*

Q. Mrs. Kernick, were you in your apartment about 7:25 p.m. on the night of June 17, 1956?

A. Yes, I was.

Q. And who else was present in the apartment at that time?

A. Fred Levi.

Q. Who else was present.

A. That is all.

Mr. Glasser: Excuse me. Is Fred Levi in the court room now?

The Witness: Yes, he is.

Mr. Glasser: I suggest he be asked to step outside.

The Court: All right.

Mr. Strouse: No. He has been present in court here during the course of the trial.

The Court: Well, even so. Proceed.

By Mr. Strouse:

Q. At 7:25 in the evening on June 17th, who else was present besides you and the man by the name of Fred Levi?

132 A. Well, the Agents were there.

Q. And do you know the names of the Agents?

A. No, only know his name, the fellow behind you.

Q. Agent Heisig?

A. Yes.

Q. There were several other Agents there?

A. That is right.

Q. At about 7:25?

A. Yes.

Q. About that time did you place a telephone call?

A. Yes, I did.

Q. What number did you call?

A. At the present I can't remember the number.

Q. Whom did you call?

A. Well, I was supposed to have called Fred Washington, that is what I was supposed.

Q. You called the number that was Fred Washington's telephone number?

A. It was supposed to have been his number.

Q. That was Kenwood 6-6460, to refresh your recollection as to the number?

A. I think that was it.

Q. You had called that number before, had you
133 not?

A. Oh yes.

Q. That was Fred Washington's telephone number, wasn't it?

A. Yes.

Q. You talked to Fred on the telephone, on that telephone number, on many occasions in the past?

A. Before then?

Q. Yes, before that evening.

A. Yes.

Q. And who answered the telephone?

A. Well, truthfully speaking, I don't know. It was not Fred, I am sure.

Q. You say it was not Fred?

A. No, it was not.

Q. Did you talk to Fred on the phone many times?

A. Yes.

Q. And you are positive it was not his voice that you heard?

A. No.

Q. Do you remember the conversation?

A. Yes, I think I do.

Q. Do you remember asking if Fred was there?

A. I—when I called, I think I said, "Fred?"
134 And they said, "Who is this?"

I said, "Dee."

And they said, "Well, what is it?"

I asked, I said, "Can you send me two?"

And whoever it was, they said, "Yes."

I said, "How long will it take?"

They said, "An hour."

Q. Do you remember asking, "Is Fred there?". And the voice on the other side answering, "Yes, this is Fred. Who is this?"

A. No.

Mr. Glasser: I think she has already answered that that did not happen.

The Court: Well, she has answered it again, so that is all right. She said, "No."

By Mr. Strouse:

Q. Do you know who was the voice that was talking on the other end of the telephone?

A. No, truthfully speaking, I don't.

Q. You did not recognize the voice?

A. No.

Q. You had never heard that voice before, is that right?

A. Not over the phone, no.

135 Q. How did you know that this person on the other end of the phone was going to understand what you meant when you said, "Send me two"?

Mr. Glasser: Objected to.

The Court: She may answer.

By the Witness:

A. Well, I didn't know that he was going to understand. I just said what the Agent told me to say.

By Mr. Strouse:

Q. I show you a paper and ask you if that bears your signature?

A. That is right; that is my writing.

Q. On page 3?

A. Right, sir.

Mr. Strouse: I better have this marked. Mark this for identification Government Exhibit 9.

(Said was marked for identification Government Exhibit 9.)

136-137 • • •

138 • • • By Mr. Strouse:

Q. Now, showing you what has been marked Government Exhibit 9—

Mr. Glasser: If your Honor please, can the defendant also be advised she has a right to exercise her constitutional immunity if she so desires?

The Court: I think that is correct.

Mr. Glasser: I think she ought to be so advised.

The Court: Well, I think that you can give her that advice.

Mr. Glasser: All right.

Mrs. Kernick, I would like to advise you at this time that, in view of the fact you are presently under
139 indictment, and the fact that this statement tends to implicate you in a violation of law, that you do not have to testify unless you want to; that under the provisions of the Fifth Amendment to the United States Constitution you have a perfect right to refuse to testify on the ground it may tend to incriminate you in the other case.

Now, having been so advised, do you want to testify or don't you?

The Witness: It does not make any difference, because I want to tell the truth about it anyway.

Mr. Glasser: Well, it is up to you.

By Mr. Strouse:

Q. Showing you this three-page document, marked Government Exhibit 9 for identification, are these your initials on page 1?

A. That is right.

Q. And your initials on page 2?

A. Yes.

Q. And your signature on page 3, is that right?

A. That is right.

140 Q. And did you sign the statement on the date which it bears, June 18, 1956?

A. Yes.

Q. And did you read the statement before you signed it?

A. I read some of it. I didn't read it all. I just put it down.

Q. And it was true at the time you made it?

A. No. I did it because the Agent told me that he would be lenient with me and my husband; and, naturally, I was going to try to save my husband and myself. Anything they asked, I went along with them.

141 • • • By Mr. Strouse:

Q. Calling your attention to June 18th, the date of this statement, didn't you in this statement say that at 7:25 that evening, meaning the evening of June 17th, you dialed Kenwood 6-6460, while being observed by Agent Heisig.

142 "This is the phone where I always get Fred Washington. We had the following conversation:

'Ardie: Is Fred there?

'Fred Washington: Yes, this is Fred Washton. Who is this?

'Ardie: This is Dee, Baby.

'Fred Washington: Yes.

'Ardie: Can you get me a couple?

'Fred Washington: Yes, I can get you a couple.

'Ardie: How long will it take?

'Fred Washington: About an hour.

'Ardie: O. K.

'Fred Washington: O. K. Goodbye.'"
Didn't you sign a statement with that provision in it?

Mr. Glasser: I object.

The Court: Did you make that statement?

By M. Strouse:

Q. Did you make that statement?

A. No, I didn't word it like that. The Agent He worded it the way he wanted it.

143 Q. And you deny at this time that you made this statement?

A. That is right.

Mr. Glasser: Well, that is not the import of what she said, if your Honor please.

The Court: Well, that may stand.

Mr. Strouse: It certainly is, your Honor. She has just said she did not make this statement.

The Court: That is right.

Mr. Glasser: When you say "this statement"—

The Court: Oh no, the question.

Mr. Glasser: She didn't use that exact language.

Mr. Strouse: I am sorry, I will correct the record.

By Mr. Strouse:

Q. With respect to the questions I asked you, you deny being asked those questions and making those answers?

A. That is right.

144 *Cross Examination by Mr. Glasser.*

Q. Mrs. Kernick, before you came into the court room this morning, the prosecutor said that you had made this statement, and that after your husband was sentenced to the penitentiary in Kansas City, that you told them or got word to them that you were not going to stand by that statement you made.

A. Got word to them how?

Q. Well, some way. Now, the question I want to ask you is this: You said on your examination by the Government that they had promised you certain something in return for which you signed this statement.

A. Yes, and which they didn't do.

Q. And when your husband was sentenced to the penitentiary, you found out they didn't do it, and so you didn't want to stand up on this memorandum.

A. No, I didn't change because they sent him to the penitentiary. I changed because I knew I was wrong and I had lied about it, and they had worded it. That is why I changed it.

Q. Mr. Kernick, I would like you to look at this statement. How much of an education have you got?

145 A. I went through high school.

Q. Did you ever write any plays?

A. Yes, occasionally.

Q. Write them?

A. Yes.

Q. Now, this is written here, it says, "Ardie," "Fred Washington," "Ardie," "Fred Washington," and so forth.

A. That is right.

Q. Did you make that up? Did you tell them that way?

A. No, I did not tell them like that. He worded it himself.

Q. Who is he?

A. Agent Heisig.

Q. Now, will you tell us — you said that the Agents were in your apartment about 7:25.

A. That is right.

Q. What time did they get to your apartment?

A. As far as I can remember, it must have been about 5:15, I believe.

Q. About 5:15?

A. Somewhere around there.

Q. Did you have a conversation with them?

146 A. When they came in?

Q. Yes.

A. Yes.

Q. Did they have a search warrant for your place?

The Court: I take it, it is admitted they did not?

Mr. Strouse: I don't see where this is pertinent, your Honor. I think it has already been shown that they were there; that they arrested —

The Court: Yes, but there wasn't any search warrant?

Mr. Strouse: No.

The Court: All right.

Mr. Glasser: There was no search warrant?

The Court: No.

By Mr. Glasser:

Q. How did they gain access to your place? How did they get into your place?

A. Well, I had the door on the burglar chain, because Fred Levi and I had just come in; and when they came to the door they knocked pretty hard, and I saw them through this crack, and they said, "Open the door or I'll kick it in."

147 I said, "You don't have to kick it in. I will open it, whoever you are."

So they came in, and they came in so rough, and they presented, you know, their badges, that they were officers.

They said, "You might as well come and tell us the truth about it, because we have your husband in Kansas City."

I said, "So what?"

"Well, he told us everything."

I said, "If he has told you everything, what do you want from me?"

"We want to know about Fred Washington."

"What is it you want to know about Fred?"

So they went on to explain to me what they wanted with him, and so they searched, they searched the house.

I said, "Whatever you are looking for, you can search but there is nothing you can find here but me and my belongings."

Q. How long did they search the house?

A. Well, let me see now. I want to be truthful. I think when we left out of there, it must have been
148 about seven-thirty or a quarter to eight o'clock, if I am not mistaken.

Q. They were there two or three hours?

A. That is right.

Q. What did they do, did they take things out of your drawers?

A. Yes, they taken things out of my drawers, they taken my husband's pistol that was registered, and my fountain pen that he had bought me.

Q. What about the furniture, did they look through the furniture?

A. They looked through everything.

Q. Did they upset anything in your apartment?

A. Yes, they upset it.

Q. Tell us something about that.

A. Well, they taken all the stuff out of the drawers.

Q. Did they put it back in the drawers?

A. No, they didn't put it back.

Q. Then you say they kept talking to you about calling Fred Washington?

A. Yes, that is right.

Q. They wanted you to call Fred Washington?

A. That is right.

149 Q. Did they make you any promises of a reward as a result of your calling Fred Washington?

A. Yes. They said they would go easy with me and my husband.

Q. Say anything about the bond?

A. They said, "If you don't help your husband, he is liable to rot in jail."

Well, you know I don't want that, because my husband is elderly, you know, pretty well up in age.

Q. He said he would rot in jail if you didn't help him?

A. Help him, that is right.

Q. Did he say anything about your own bond, or what it would be?

A. He said they would lower my bond so that I could get out; but they didn't lower it. The other attorney I had before the Commissioner was the cause of it being lower to get out. I had to pawn my jewelry to get out of there.

Q. So, when you came down to the building the next morning, were you in jail overnight?

A. Yes, I was in jail overnight.

Q. The next morning you came down to their 150 office, and you gave them this statement?

A. That is right.

Q. There are a lot of facts in there with dates and so forth. Did you give them those dates or did they give them to you?

A. They must have put them in there themselves.

Mr. Strouse: Object. We have only gone into one conversation, the one section of the statement. The question we asked — we asked just the one question.

The Court: She may answer. That may stand.

By Mr. Glasser:

Q. Oh, yes, by the way, Mrs. Kernick, where is your telephone in your apartment?

A. In my bedroom.

Q. Who was in your bedroom at the time you made the telephone call?

A. Mr. Heisig, and another little short fellow. I didn't know his name, and myself.

Q. Well, now, Mrs. Kernick, who dialed the number?

A. I think I did.

Q. Now, Agent Heisig said that he listened to that conversation by holding his head right next to yours
151 while you were having the conversation. Now, Agent Mattera says that he and Heisig together.

A. No, no.

Q. Put their heads together and with you all listened to the conversation.

A. No, no.

Q. Is that true?

A. No. Heisig put his ear to the phone at first when I was dialing, but it was impossible for him to hear, because the phone was too close to my ear. The other man sat at the foot of my bed, and that is where he was when he came in there, and that is where he was when he came out.

Q. So, if he testified he had his ear to that phone, he was not telling the truth?

A. That is right. He was busy looking for some vodka that was in the house.

Q. Is what what he said, looking for a little vodka. So that, as you sit there now, you say that whoever answered the phone, so far as you know, it was not Fred Washington?

A. It was not Fred.

Q. You are sure of that?

152 A. I am sure of that, because I have talked to Fred over the phone before, because I am a personal friend of his wife.

Q. And the only reason you put it in this statement was because they said your husband would rot in jail if you didn't?

A. That is right.

Q. Is that right?

A. That is right.

Mr. Glasser: That is all.

(Witness excused.)

153 Mr. Strouse: I would like to offer in evidence Government's Exhibits 1, 2, 3, 3-A, 4-A, 4-B and 4-C.

Mr. Glasser: I have no objection.

The Court: All right, they may go in.

Mr. Strouse: The Government will rest, your Honor.

154 (Defendants' motion to suppress. Defendants' motion for judgment of acquittal. Arguments thereon. Not transcribed.)

155 The Defendants Offered and Introduced the Following Evidence:

FRED WASHINGTON, called in behalf of the defendants, being first duly sworn, testified as follows:

The Court: What is your name?

The Witness: Fred Washington.

The Court: Where do you live?

The Witness: 4627 Drexel.

The Court: What do you do, if anything?

The Witness: Well, I have — at least, my wife has a beauty parlor, which we have had for seven years; and I have a half interest in the Ida May Parlor.

The Court: What is that?

The Witness: Ida May Parlor, that is a tavern, 3100 3100 Indiana.

The Court: Go ahead.

156 *Direct Examination by Mr. Glasser.*

Q. First, Mr. Washington, I want to ask you: You are charged in this indictment with having purchased some heroin, some 486 grains of heroin that was testi-

fied here — actually it was one-sixth of an ounce of heroin — on June 17, 1956. Did you on that day purchase any heroin?

A. No, I did not.

Q. On that same day you were charged with having knowingly received, concealed, bought and facilitated the transportation and concealment of 486 grains of heroin. Did you do that?

A. No, I did not.

Q. Have you ever been arrested for a narcotic violation?

A. Not up until this time.

Q. Not for what?

A. Not until now.

Q. I am not talking about now. Before this case were you ever arrested for a narcotic violation?

A. No, I have not been.

Q. Now, I call your attention again to June 17, 1956. Did you on that day receive a telephone call from 157 Ardie Kernick?

A. No, I did not.

Mr. Glasser: You may cross examine.

Cross Examination by Mr. Strouse.

Q. Where were you on June 17, about seven-thirty?

A. Well, about seven-thirty I think I was on my way to 6213 Greenwood.

Q. Where were you just before that?

A. I left home about — well, I know it was before seven o'clock when I left home.

Q. Before seven o'clock?

A. When I left home. It was a Sunday evening.

Q. Did you leave by yourself?

A. No.

Q. Who left with you?

A. Joe Guster.

Q. You and he left your house before seven?

A. Around seven, anyway.

Q. What is your telephone number?

A. Now Kenwood 6-2315.

Q. What was your telephone number on June 17th?

A. Kenwood 6-6460.

158 Mr. Strouse: I have no further questions, your Honor.

(Witness excused.)

JOE GUSTER, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

The Court: What is your name?

The Witness: Joe Guster.

The Court: Where do you live?

The Witness: 6213 South Greenwood.

The Court: What do you do, if anything?

The Witness: Well, I do porter work at the Illinois Central barber shop.

The Court: Porter work?

The Witness: Yes.

The Court: All right. Proceed.

Direct Examination by Mr. Glasser.

Q. Are you acquainted with the defendant Fred Washington?

A. Yes, sir, I am.

Q. Are you friendly with him?

159 A. Yes, sir, very friendly.

Q. I want to call your attention to June 17, 1956, last June. Do you remember whether you saw Mr. Washington on that date?

A. Yes, sir, I saw him that day.

Q. What time in the day was it?

A. Around about six, between six-fifteen and six-thirty. It may have been a little later.

Q. Where did you see him?

A. At his house.

Q. Did you stay at his apartment?

A. For about thirty-five minutes.

Q. About thirty-five minutes? Then what did you do?

A. Well, he was in bed when I went in there, and he got up and got dressed, put on his clothes, and it was turning cool, and so I did not have a sport jacket, so I asked him would be drive me out to my house to pick up a sport jacket.

We picked up my sport jacket, and came back to 45th and Drexel, and picked up a girl, and taken her to State and Van Buren. We must have spent about thirty minutes there, because we had to wait until she got 160 dressed. We came State to Van Buren, and dropped her off, and turned over to Michigan, and came all the way back up to 30th and Michigan, and turned over and went to Indiana.

When we got to Indiana we went to 31st Street. When we came to 31st Street, he pulled in there, it was a parking place, and when we got in the parking place, two fellows drove up in a Lincoln, black and yellow, and both of them jumped out; parked right beside us; and one came to his window, and one came around on my side and said, "Police officers. Put your hands on the dashboard."

So we put our hands on the dashboard; and the fellow ordered him out, and the fellow ordered me out.

They searched us, patted us all the way down. The fellow asked him, "Are you Fred Washington?"

He said, "Yes."

He said, "O. K. Get in the car."

They put him in their car, and this fellow asked me, "What are you doing with Fred?"

Mr. Strouse: I would like to object, your Honor.

161 I think he has gone past the scope of the original question.

Mr. Glasser: All right.

162-164 * * * (Witness excused.)

165 LEON WASHINGTON, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

The Court: What is your name?

The Witness: Leon Washington.

The Court: You are one of the defendants, are you?

The Witness: Yes.

The Court: Where do you live?

The Witness: 4645 Evans Avenue.

The Court: What, if anything, do you do?

The Witness: I am unemployed.

The Court: Go ahead.

Direct Examination by Mr. Glasser.

Q. Leon, are you a user of narcotic drugs?

A. Yes, I am.

Q. How long have you been addicted to the use of drugs?

A. Seven years.

Q. I call your attention to June 17, 1956. That was the day on which you were arrested, I believe.

166 A. Yes, sir.

Q. Were you in your brother Fred Washington's apartment on that day?

A. Yes, I was.

Q. Did you answer a telephone call in that apartment on that day?

A. Yes, I did.

Q. Who did you talk to at that time?

A. Ardie.

Q. Ardie Kernick?

A. Yes.

Q. What was the substance of that conversation? What did she say to you, and what did you say to her?

A. Well, she said, let me see—

Q. Look this way, so the judge can hear you.

A. She called, and she said a half, or something like that.

She said, "I want two." "I want two."

Q. What did you say?

A. I told her, "O. K."

She said, "How long will it be?"

I said, "About an hour."

Q. What did you do then after you had that 167 conversation?

A. I left the house and went and got in my car and went to 35th between Prairie and Indiana.

Q. By the way, what kind of car do you drive?

A. 1950 Pontiac.

Q. Is it a green one?

A. Yes.

Q. All right.

A. I seen a fellow by the name of Wallace. That is who I was buying my narcotics from. And I told him what was happening, that I had a chance, you know, to sell two ounces of the stuff, of narcotics, and I didn't have the money, but I would get the money when I took the narcotics up to the house.

He came back to the corner of 46th and Drexel with me, and I went up to the house with the narcotics, and when I walked in there I was arrested.

Q. Now, did you make that purchase for the purpose of selling it?

A. No. I told the fellow that I got the narcotics from that I probably would get a fix out of it.

Q. You thought if you brought it over there you
168 would get a shot or a fix, or whatever you call it?

A. Get a fix.

Q. And the only reason you went there was because of that telephone call from Ardie Kernick, is that right?

A. Yes.

Cross Examination by Mr. Strouse.

Q. What was the name of this man you said you bought narcotics from?

A. Wallace.

Q. W-a-l-l-a-c-e?

A. I guess that is the way he spells it.

Q. Mrs. Kernick, are her initials R. B.?

A. R. D.

Q. R. D. Kernick?

A. Yes.

Q. You say you talked to her on the telephone at seven-thirty?

A. I don't know what time it was.

Q. What were you doing up in your brother's
169 apartment?

A. Waiting to see Fred.

Q. You did not live there?

A. No, I did not.

Q. You said you were the only one that was up there?

A. No, I was not the only one there.

Q. Who else was there?

A. Well, he had some roomers living there at the time.

Q. They were up there too?

A. They were in their rooms. I was in the front room, looking at the TV.

Q. You didn't come out of that apartment with your brother Fred?

A. No, I didn't.

Q. You have delivered narcotics to other people, haven't you?

Mr. Glasser: Object, if your Honor please.

The Court: Sustained.

By Mr. Strouse:

Q. How did you happen to meet this fellow?

Mr. Glasser: Which fellow?

170 By Mr. Strouse:

Q. Mr. Wallace, that you testified you got the narcotics from.

A. That is who, when I would buy my narcotics, I would buy it from him.

Q. From him?

A. Yes.

Q. How did you happen to meet him that night?

A. He was down on 35th, in the tavern.

Q. He was down at 35th in a tavern?

A. That was where I would see him it.

Q. Did you go down there?

A. Yes, I did.

Q. When did you go down there?

A. When I left Fred's house.

Q. About what time was that?

A. Well, that was a little before dark, just before I come back to the apartment.

Q. But you don't remember what time it was?

A. No, I don't know exactly, but it was before dark. It was in the evening.

Q. And you drove down there in your car?

A. Yes, I did.

Q. Were you alone in your car?

171 A. No, I picked up my nephew—I had my niece with me.

Q. How old is your niece?

A. Three years or four.

Q. About three years old?

A. Yes.

Q. Then when you came back, where did you park your car?

A. I parked the car at 46th Street, between Ellis and Drexel, and I met him, and he gave me the narcotics; and he was waiting on the corner for me when I went up in the building; and I told the Agents he was outside there waiting for me, and they rushed out there.

Q. You don't live at 4627 South Drexel, do you?

A. No, I don't.

Mr. Strouse: No further questions.

(Witness excused.)

Mr. Glasser: Defendants rest.

* * *

172-175 * * *

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IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 56 CR 398) * *

This cause coming on for decision of the Court after trial comes the United States by the United States Attorney come also the defendants Leon Washington and Fred Washington in their own proper persons and by their counsel and the Court now being fully advised in the premises finds the defendants guilty as charged in the Indictment filed herein against them and on motion of the defendants it is

Ordered that this cause be and the same is hereby continued to June 14, 1957 at 10 a. m. for disposition

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UNITED STATES DISTRICT COURT

• • (Caption- No. 56 CR 398) • •

On this 13th day of September, 1957 came the attorney for the government and the defendant appeared in person and[1] by his counsel

It Is Adjudged that the defendant has been convicted upon his plea of[2] not guilty and a finding of guilty of the offense of Section 4704(a), Title 26, U.S.C.; Section 174, Title 21, U.S.C. (Unlawful purchase of heroin; receiving, concealing, buying and facilitating the transportation and concealment after importation of heroin) as charged[3] and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of[4] Two (2) Years and besides that he forfeit and pay to the United States of America a fine in the sum of One Dollar ($1.00) and that he stand committed until the fine is paid or until he shall be otherwise discharged by due course of law

It Is Ordered that execution of sentence be and the same is hereby stayed for a period of 15 days and that bond of the defendant heretofore filed herein shall remain in full force and effect

It Is Adjudged that[5]

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States

Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Philip L. Sullivan,
United States District Judge.

The Court recommends commitment to:[6]
September 13, 1957
Enter order
September 13, 1957
KS

---

[1]Insert "by counsel" or "without counsel; the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel." [2]Insert (1) "guilty," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be. [3]Insert "in count(s) number " if required. [4]Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding or unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law. [5]Enter any order with respect to suspension and probation. [6]For use of Court wishing to recommend a particular institution.

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IN THE UNITED STATES DISTRICT COURT
(Caption No. 56 CR 398)

NOTICE OF APPEAL
(Filed Sep 23 1957)

Name and Address of Appellant, Fred Washington, 4627 Drexel Ave., Chicago.

Name and Address of Appellant's Attorney, Daniel D. Glasser, 134 N. LaSalle, Chicago.

Offense, Purchase and Concealment of Narcotics, Sections 4704(a) Title 26 and Section 174, Title 21 U.S.C.

Concise statement of Judgment or order, giving date and sentence,

Defendant guilty, committed to the custody of the Attorney General for a period of two years and fined $1.00 September 13, 1957.

Now on Bail.

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the Seventh Circuit from the above-stated judgment. September 20th, 1957.

/s/ Fred Washington
Appellant

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(Caption No. 56 CR 398)

CERTIFICATE OF MAILING

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify that on September 23, 1957, in accordance with Rule 73(b) of the Federal Rules of Civil Procedure, and Criminal Procedure a copy of the foregoing Notice of Appeal was mailed to:

Honorable Kenneth J. Carrick, Clerk
United States Court of Appeals, Seventh Circuit
1212 Lake Shore Drive
Chicago 10, Illinois
Honorable R. Tieken, United States Attorney
450 United States Court House
Chicago 4, Illinois

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court

at Chicago, Illinois this 24th day of September, 1957.
Roy H. Johnson
Clerk
By /s/ Gizella Butcher
Deputy Clerk

(Seal)

180

IN THE UNITED STATES DISTRICT COURT

• • • (Caption No. 56 CR 398) • •

STATEMENT PURSUANT TO RULE 12(d)
(Filed Sep 24 1957)

1. The name of the plaintiff-appellee is:
United States of America
2. Counsel for the plaintiff-appellee are:
R. Tieken, United States Attorney
Room 450 U.S. Courthouse, Chicago 4, Illinois
John P. Lulinski
Edwin A. Strugala
Harry D. Strouse
Assistant United States Attorneys
Room 450 U.S. Courthouse, Chicago 4, Illinois.

Respectfully submitted,
/s/ R. Tieken
R. Tieken
United States Attorney

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THE UNITED STATES COURT OF APPEALS

• • (Caption—District Court No. 56 CR 398) • •

STIPULATION PURSUANT TO RULE 12 (e)
(Filed Oct 9 1957)

It is hereby stipulated by and between the attorneys for the plaintiff and the attorney for the defendant, pur-

suant to Rule 12 (e) of the United States Court of Appeals, for the Seventh Circuit, that the Clerk of this District Court shall include among the original papers to be transmitted to said Court of Appeals the items listed and shall omit all others:

6/26/56 Indictment
10/ 5/56 Defendant Araigned. Plea of Not guilty
1/ 8/57 Jury waiver filed in open Court and approved
3/27/57 Evidence heard for U.S. U.S. rests. Ruling on motion of defendants to suppress evidence is held in reserve. (All other orders entered in this case on March 27th, 1957.
6/ 6/57 Defendant Fred Washington found guilty as charged in indictment
9/13/57 Defendant committed to the custody of Attorney General for a period of two years and fined $1.00
9/23/57 Filed Notice of Appeal
Transcript of Testimony.

/s/ R. Tieken
United States Attorney
/s/ Daniel D. Glasser
Attorney for Defendant.

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IN THE UNITED STATES DISTRICT COURT

• • (Caption—No. 56 CR 398) • •

On motion of the defendant, the plaintiff interposing no objection thereto, it is

Ordered that the time within which to docket this case and file the Record in the United States Court of Appeals be and it hereby is extended to November 21, 1957.

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United States of America)
Northern District of Illinois) ss:

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify that the annexed and foregoing are the original papers constituting the record on appeal in the cause entitled: United States Of America, Plaintiff vs. Leon Washington and Fred Washington, Defendant, No. 56 CR 398, as follows:

Indictment filed June 26, 1956

Order entered October 5, 1956, plea and arraignment

Order entered January 8, 1957, Jury trial waived

Waiver of trial by Jury, filed January 8, 1957

Order entered March 27, 1957, defendant motions entered and ruling thereon reserved

Clerk's File Copy of Transcript of Proceedings had before the Honorable Philip L. Sullivan, on March 22, 26, and 27, 1957, and filed by the Official Court Reporter on November 20, 1957

Order entered June 6, 1957, defendants found guilty

Order entered September 13, 1957, judgment and commitment re defendant Fred Washington

Notice of Appeal of Defendant Fred Washington, filed September 23, 1957, (Clerk's Certificate of Mailing attached thereto)

Appellee's Statement pursuant to Rule 12(d), filed September 24, 1957

184 Stipulation pursuant to Rule 12(e), filed October 9, 1957

Order entered November 1, 1957, extending the time in which to file and docket record on appeal to November 21, 1957

filed and entered among the records of the said Court in my office, on the dates indicated.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 20th day of November, 1957.

Roy H. Johnson

Clerk

By /s/ Gizella Butcher

Deputy Clerk

(Seal)

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FILED
MAY 16 1958
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 1012

FRED WASHINGTON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Certiorari to the United States Court of Appeals
for the Seventh Circuit.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

DANIEL D. GLASSER
134 N. La Salle Street
Chicago, Illinois
Attorney for Petitioner

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957.

No.

FRED WASHINGTON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Certiorari to the United States Court of Appeals for the Seventh Circuit.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Fred Washington, petitioner, prays that a writ of certiorari be issued to review the decree of the United States Court of Appeals for the Seventh Circuit, entered in the above cause on April 17th, 1958, affirming the judgment of the United States District Court for the Northern District of Illinois.

OPINIONS BELOW.

The trial court filed no opinion, The opinion of the Court of Appeals has not yet been published It appears in the appendix of this petition. (p. 1a.)

JURISDICTION.

The judgment of the Court of Appeals was entered on April 17th, 1958. The jurisdiction of this Court is invoked under Section 1254 of the Judicial Code, and Rule 19.

QUESTIONS PRESENTED.

Whether an arrest made only for an ulterior purpose and without probable cause was not an unwarranted and illegal invasion of the rights of the defendant as guaranteed by the Fourth and Fifth Amendments to the Constitution.

Whether the failure of the Government to sustain its burden of proving the defendant guilty beyond a reasonable doubt did not make his acquittal mandatory.

STATUTES INVOLVED.

United States Code, Title 26, Sec. 4704 (a)
United States Code, Title 21, Sec. 174

STATEMENT OF THE CASE.

On June 17th, 1956 at about 5:15 P.M. agents of the Federal Narcotics Bureau, without a search warrant (app. 86) knocked "pretty hard" on the door of the apartment occupied by Mrs. Ardie Kernick and her husband.

Mrs. Kernick opened the door as far as the burglar chain would permit, looked through the "crack" and was told by one of the agents, "Open the door or I'll kick it in". (App. 86)

Thereupon Mrs. Kernick opened the door and permitted the agents to come in. They were "rough" and they told her that they had arrested her husband in Kansas City, and they also said that they would go easy with her and

her husband if she would call Fred Washington. They said, (App. 88)

> "If you don't help your husband, he is liable to rot in jail".

Mrs. Kernick was apprehensive because her husband is elderly. The agents also promised to see that her bond, on arrest, would be lowered.

The agents then started a systematic search of the entire Kernick apartment. They took her things out of the drawers and looked through the furniture, but did not put the things back. (App. 86)

About two or three hours after the agents entered the apartment, Mrs. Kernick made the call as requested. (App. 86)

Agent Heisig testified that the call was made at his "suggestion". (App. 24)

The phone number which was dialed by Mrs. Kernick was listed in the name of Mrs. Washington, the defendant's wife. (App. 48)

Agent Heisig testified that he put his head "right against hers" and listened to the conversation. (App. 24) Agent Mattera later testified that he too listened to the same conversation at the same receiver at the same time. (App. 77) Heisig did not testify that Mattera listened to the conversation.

Prior to the call neither Agent Heisig nor Agent Mattera had ever heard the voice of Fred Washington. (App. 14 76-78)

Since this telephone conversation is the only evidence and is the entire case of the Government insofar as peti-

tioner Fred Washington is concerned, we are printing it here as testified to by Agent Heisig: (App. 17)

> Ardie Kernick said, "Hello, is this Fred?"
> Fred Washington said, "Yes. This is Fred. Who is this?"
> Ardie Kernick said, "This is dee, baby" and he said "Yes."
> Ardie Kernick said, "I would like a couple".
> And he said, "I can get you a couple."
> And then she said, "How long will it take?"
> Then he said, "About an hour or so."
> She said, "Okay".
> And he said, "Okay".

Mrs. Kernick's testimony as to the content of the above conversation, slightly different from the above appears on page 81 of the Appendix.

About an hour after the call, Leon Washington, the brother of petitioner, Fred Washington, arrived at the home of Ardie Kernick, and had in his possession one-sixth on an ounce of heroin. (App. 12)

Leon Washington testified that it was he that Mrs. Kernick spoke to on the phone. (App. 94-96)

Mrs. Kernick testified that it was not Fred Washington to whom she spoke on the phone. (App. 89)

Petitioner Fred Washington, who has no previous narcotic record, denied that he received a call from Mrs. Kernick on the day in question. (App. 91)

Although when the call was made, Agent Heisig did not know the voice of the person to whom Mrs. Kernick was speaking, (App. 14-16), nevertheless and without further identification he ordered the arrest of Fred Washington. Heisig testified: (App. 25)

"I ordered the arrest, but I was not certain that the defendant was the same person as the person to whom the phone call was directed."

During part of the telephone conversation, Agent Heisig and Agent Mattera were carrying on a conversation for the benefit of other agents present, but not listening to the conversation. (App. 71)

Leon Washington testified that he was an addict and that when he got the call from Mrs. Kernick he thought that by delivering the narcotics, he could get a "fix" for himself. Leon Washington has been convicted and is serving his sentence in connection with the delivery of the narcotics above described.

About two hours after the call above referred to, was made by Mrs. Kernick, Agents Emerick and Love, without a warrant, arrested Fred Washington. (App. 56)

When Fred Washington was arrested he was not violating any law. (App. 56)

The next morning Agent Heisig and Agent Mattera spoke to Fred Washington in the office of the Narcotics Bureau. This was the first time that either of them had ever spoken to Fred Washington or heard his voice, except for the fact that they identified it as the voice which they had heard speaking to Mrs. Kernick the night before. (App. 24)

The Court found the defendant guilty and sentenced him to a term of 2 years and fined him $1.00.

REASONS FOR GRANTING THE WRIT.

The evidence of the Government is weak, contradictory and incredible, therefore the conviction should be reversed.

The dissenting opinion of Chief Judge Duffy (See Appendix of this brief) states succinctly and cogently many reasons why the validation of the judgment of the Court below, would be a gross misapplication of the basic protections guaranteed our people by the Constitution.

Preliminarily we would like to assure the Court that we understand fully the reluctance with which this Court will review a case on the evidence alone. Yet we are compelled to the conclusion that this is a case which cries out for a decision, spelling out boundaries beyond which the Federal Agent may not trespass in his zealous endeavor to uncover violations of law.

Judge Duffy says in his dissent, (opinion p. 5)

> "I respectfully dissent. I am inclined to believe that the natural abhorrence that all good citizens must feel toward those engaged in the illicit narcotic business, has caused the majority of this panel to reach an erroneous conclusion."

The words of Judge Duffy are a warning signal which we cannot afford to ignore.

The present intensive drive to eliminate the narcotic traffic must not be used as a cloak for depriving our citizens of their basic rights. Should this invasion be permitted, why not others?

The question which we raise here is that there is no legal evidence to connect this petitioner with the offense charged.

In *Abrams* v. *United States*, 250 U.S. 616, 619 this Court said:

> "A question of law is thus presented, which calls for an examination of the record, not for the purpose of weighing conflicting testimony, but only to determine whether there was some evidence, competent and substantial, before the jury, fairly tending to sustain the verdict."

We have seen in the Statement of Facts herein how Agents for the Narcotic Bureau wholly disregarding the rights of the people, without a search warrant, gained access to the apartment of Mrs. Kernick by intimidation and threat. (App. 86)

After ransacking the apartment for about two hours and making promises and threats of one kind and another, the agents had Mrs. Kernick dial the phone of Mrs. Washington, the wife of Petitioner. (App. 36)

The conviction of the defendant in this case rests on the above alleged telephone conversation between one of the witnesses in the case and the defendant. Parenthetically we might call the Court's attention to the fact that the person making the call denied on the stand that she spoke to the defendant. (App. 89) The defendant testified that he did not get the call. (App. 91) The defendant's brother, and the one arrested in possession of the contraband, testified that it was he who received the call and spoke to Mrs. Kernick in the phone conversation here in question. (App. 95)

The defendant's voice was — at the time of the call — unknown to the agent who allegedly listened to the conversation. As related by the agent, there were exactly 20 words used by the defendant. We have tested with a stop

watch the amount of time, speaking slowly, that it would take to repeat those 20 words. That time is 10 seconds.

So, in 10 seconds — with the added handicap of two or three persons listening through the same receiver, at the same time, (App. 24, 77) and carrying on another conversation (App. 71) — the agent testified that a voice then unknown became so familiar to him that he was able to identify it as the voice of the defendant, Fred Washington, to whom he spoke for the first time the morning after the defendant was arrested.

Let us try to analyze this incredible testimony. A telephone receiver is about two inches in diameter. The voice is projected from an aperture of about one-half an inch. If we believe the implication of the testimony of agent Heisig, then he alone with his head up against the head of Mrs. Kernick listened to the less than one-quarter of a minute of telephone talk. If on the other hand we believe the testimony of agent Mattera, then all three had their ears to this small receiver. If either version is correct we contend that it was impossible, incredible and wholly inconsistent with experience in the ordinary affairs of life to believe that two or three persons endeavoring to hear a conversation from an instrument as small as a telephone receiver, could possibly, after hearing the few words uttered, in the short space of ten seconds, become so familiar with that voice, that in a conversation with a man the next day a witness could in all fairness and honesty say, "that is the voice I heard on the telephone". We are sure the Court will recognize the fact that, because of the difficulty of fitting all the heads at the telephone receiver, at the same time, certain of the 20 words spoken, must of necessity have been unintelligible to some of the listeners.

Since we have only the evidence of agent Heisig to the effect that it was the defendant Fred Washington on the other end of the antiphonal conversation, we must agree that at best there must be many areas of conjecture and speculation on the part of Heisig.

The direct evidence by the witnesses best informed on the subject matter here in dispute indicates that the *defendant was not the person* to whom Mrs. Kernick spoke on the evening in question.

Mrs. Kernick, (subpoenaed by the government, but, testifying as a court's witness) the woman who having been treated to a display of police brutality lasting more than two hours, at the "suggestion" of agent Heisig made the call and testified that it was *not the defendant* to whom she spoke. (App. 89)

Most important of all is the testimony of Leon Washington, the brother of the defendant. This brother is an addict and had a previous record (App. 94) and was fully cognizant of the fact that telling the truth about this conversation might mean additional time in the penitentiary for him, nevertheless he took the stand freely and admitted that it was he who had the telephone conversation with Mrs. Kernick. (App. 96)

Petitioner Fred Washington, who has no previous narcotic record (App. 91) testified that he did not answer the phone nor speak to Mrs. Kernick in the conversation. (App. 91)

While it is impossible in the dead record of a trial to bring before this Court the live voices of the two brothers, the Court may very well take into consideration the fact that there may have been many similarities in their voices

which could very well have influenced the thinking of agent Heisig. Although we feel that our argument under this point needs no precedent in the law to fortify us nevertheless we do think that some of the language used in the cases may be helpful.

In *Towbin* v. *United States*, 93 F. 2 861, 866 the Court stated:

> "Some evidence has been presented but it is not substantial. The law requires more than merely, 'some evidence'. It demands that the verdict be based on substantial evidence or a conviction will not be permitted to stand."

See also cases cited in the *Towbin* case.

Also appropriate is the quote from Wigmore on Evidence, Vol. 3, Sec. 2155:

> "But, if there is no recognition of voice, what can supply sufficient evidence to authenticate the speaker? In a given case, no doubt, sundry circumstances (including other admissions and the like) may suffice. But, apart from special circumstances, can any rule be laid down? No one has ever contended that, if the person first calling up is the very one to be identified, his merely purporting to be A. is sufficient, any more than the mere purporting signature of A. to a letter would be sufficient."

This case has many aspects which remind one of the case of *United States* v. *Kaplan* reported in 101 F. Supp. 7 and affirmed in 102 F. 2 1019. In that case two brothers named Max and Nathan Kaplan were mistaken for each other by the Government agent and as a result the brother Max spent six years in the penitentiary by mistake. In the trial of Nathan Kaplan—just as here—the Court said at page 10:

> "Thus, mistaken identity was the central issue."

The Court in speaking of the mistake of the Agent said, pages 10-11:

> "No question is raised as to the honesty of the Government Agent, but there is a serious question as to his opportunity for precise observation."

The tragedy of the *Kaplan* case was that even after everyone admitted the mistake it was too late for him to have a Court set aside the conviction and we understand that to this day his record remains. In the recent book by the late Judge Frank and his daughter, "Not Guilty" mention is made of the *Kaplan* case.

II.

The erroneous introduction of the telephone call coupled with the arrest without probable cause deprived defendant-petitioner of his rights as guaranteed to him by the Constitution of the United States.

It is not unreasonable to conclude from this record that agent Heisig had, before he went to the apartment of Mrs. Kernick, decided that he was going to arrest the defendant Fred Washington. His admitted "suggestion" (App. 24) to Mrs. Kernick that she call Fred Washington tells us that he was out that night to arrest Fred Washington. His zeal is best demonstrated by the following testimony which he gave (App. 25):

> "I ordered the arrest (of defendant Fred Washington), but I was not certain that the defendant was the same person as the person to whom the phone call was directed."

The above shows a callous disregard of the rights of a citizen to be protected in his person from arrest except under legal circumstances. This callousness has been condemned consistently by the courts of our land.

Mr. Justice Day in *Weeks* v. *United States*, 232 U.S. 383, stated:

> "While the efforts of courts and their officials to bring the guilty to punishment are praiseworthy, they are not to be aided by sacrificing the great fundamental rights secured by the Constitution."

In *People* v. *Castree*, 311 Ill. 392, 406, the Court said:

> "A consideration of the origin, history and use of writs of assistance in England and their use in this country and the evolution of the Fourth Amendment to the Federal Constitution, manifests the importance of this safeguard of the citizen against unreasonable searches and *seizures of his person* or property, and the necessity that it shall not be frittered away by the courts by a narrow and illiberal construction, and a willing blindness to its violation." (emphasis ours)

In *People* v. *Marxhausen*, 204 Mich. 559, 171 N.W. 557, the Supreme Court of Michigan held:

> "• • • that the 'end justifies the means' • • • is a doctrine which has not found lodgment in the archives of this court."

The right of the individual to be protected against arbitrary and unreasonable acts of government officials had its beginnings in England at the time of Magna Charta in the early thirteenth century. When these rights were invaded courts were always ready to give the offended individual substantial relief.

In *Huckle* v. *Money*, 2 Wilson 205 (1763), an action for false arrest and imprisonment based upon an illegal general search warrant, the Judge awarded the plaintiff 300 pounds, as damages for the false arrest, even though the

evidence showed that the plaintiff was a journeyman printer earning only a guinea per week in wages, and was in custody but a few hours and treated civilly with beef steak and beer.

Lord Chief Justice Pratt said:

> "* * * the small injury done to the plaintiff or the inconsiderableness of his station and respect in life did not appear to the jury in that striking light in which the greater point of law touching the liberty of the subject appeared to them at the trial; they saw a magistrate over all the King's subjects exercising arbitrary power, violating Magna Charta and attempting to destroy the liberty of the Kingdom, by insisting upon the legality of this general warrant before them; * * * to enter a man's house by virtue of a nameless warrant in order to procure evidence is worse than the Spanish inquisition, a law under which no Englishman wish to live an hour; it was a most daring attack made upon the liberty of the subject; I thought ...at the 29th Chapter of Magna Charta, * * * which is pointed against arbitrary power, was violated."

The intense feeling in the England of the 18th Century against such arbitrary abuse of power has been carried over in the United States. It was because of this intense feeling that the guarantees were incorporated in our Constitution.

It is obvious that the over-zealous official was the evil sought to be remedied by the constitutional provisions.

Cooley in his *Constitutional Limitations*, 8th Edition, page 615, states that the history of the United States immediately previous to the American Revolution in regard to writs of assistance which empowered officers in their discretion to search suspected places, were pronounced "the worst instrument of arbitrary power, the most de-

structive of English liberty and the fundamental principle of law, that ever was found in any English law book"; since they placed "*the liberty of every man in the hands of every petty officer*". Quoting from the works of John Adams, Vol. II, pages 523, 524. (Emphasis added.)

In the case of *Gouled* v. *United States*, 255 U. S. 298, 304, the court in deciding a question of unreasonable search took occasion to say:

> "Such rights (protection against unreasonable searches and seizures) are declared to be indispensable to the full enjoyment of *personal security, personal liberty* and private property, they are to be regarded as the *very essence of constitutional liberty;* and that the guarantee of them is as important and as imperative as are the guarantees of the other fundamentals of the individual citizen; that is, the right of trial by jury, to the writ of Habeas Corpus, and to due process of law" (emphasis added).

It is our position that the over-zealous agent in this case used such methods in endeavoring to detect and punish violators of the law that his acts were as reprehensible as the offenses he was seeking to punish. The United States Supreme Court has handed down many decisions touching on the illegal activities of over-zealous officers.

In *Matter of Jackson*, 96 U.S. 727, the Court used the following language:

> "Instances sometimes occur in which ministerial officers take such liberties in endeavoring to detect and punish offenders as are even more criminal than the offenses which they seek to punish."

Assuming *arguendo* that agent Heisig did hear a voice on the telephone, it is clear, since the voice was unknown to him that he was forced to order the illegal arrest s

that he might also have an opportunity of hearing the defendant's voice so as to justify his testimony. He may have felt that if after the arrest he changed his mind and could not identify the voice on the phone he would simply say, "sorry" and go on to something else. Such a procedure should not be validated by a conviction in this case.

Recently in *Rea* v. *United States,* 350 U.S. 214, 217 (1956), the Court stating the position sought to be sustained under this point held:

> "The obligation of the Federal Agent is to obey the rules. They are drawn for innocent and guilty alike. They prescribe standards of law enforcement. They are designed to protect the privacy of the citizen, * * *. That policy is defeated if the Federal Agent can flout them and use the fruits of his unlawful act either in Federal or State proceedings."

This court, we are sure, will take judicial notice of the fact that the foundation of our government rests upon our democratic institutions, born in England in the 13th century with the Magna Charta, painstakingly developed there over the centuries, and then transported to the shores of America, where the Fathers of the American Constitution in their far-reaching wisdom drafted a Constitution that has extolled and protected the rights of freedom and liberty in the individual citizen above all else. These cherished democratic institutions are now being attacked and threatened by the rising power of the police state in other parts of the world where the government official is the repository of power and the private individual lives in complete subjection without rights of liberty, privacy or property. It is in times such as these that the Courts must be particularly vigilant and stand as the bulwark to stem this monstrous power from engulfing our way of life.

We feel that the case at bar must be interpreted and adjudicated in the light of the background and development of our democratic institutions, and the threat to these institutions. In other words, our way of life *vis-a-viv* the way of life of the countries which have forsaken the dignity of the individual.

CONCLUSION.

It is submitted that the protection of the citizen from persecution by police officials has been the sacred obligation of all, but particularly has it been guarded by the Courts for without their vigilance, Magna Charta, Our Constitution and the Bill of Rights would now be only historic reminders of a dead ideal.

The public interest is, therefore, highly involved in this case—that, in a democracy, justice shall be fair, regular, and in accord with the law of the land.

Wherefore, it is respectfully submitted that this petition for a Writ of Certiorari be granted.

Respectfully Submitted,

DANIEL D. GLASSER,
Counsel for Petitioner

APPENDIX.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 12185 SEPTEMBER TERM 1957—APRIL SESSION 1958

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
FRED WASHINGTON,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

April 17, 1958

Before DUFFY, *Chief Judge*, HASTINGS and PARKINSON, *Circuit Judges.*

PARKINSON, *Circuit Judge.* This appeal is from a conviction on a two count indictment charging narcotic law violations of Title 26 U.S.C.A. §4704(a) and Title 21 U.S.C.A. §174, respectively. Trial was to the court.

The District Court found both defendants, Leon and Fred Washington, guilty as charged. Leon Washington is now serving his sentence. Fred Washington has appealed.

The uncontroverted facts are that in the early evening of June 17, 1956 Theodore Heisig, George Mattera, George Emerick and Jack E. Love, Federal Narcotics Agents, were in the apartment of a Mrs. Kernick at 4615½ South Drexel

Boulevard in Chicago; that at the suggestion of Agent Heisig she called the apartment of Fred Washington at 4627 South Drexel Boulevard in Chicago by dialing KE 6-6460, the unlisted telephone of Della Washington, the wife of Fred Washington; that she told the agents that the person who answered was Fred Washington; that she asked him if he could send her "a couple" (meaning heroin) and he said he could and it would take about an hour.

After Mrs. Kernick had told the agents she was talking with Fred Washington and while the telephone conversation was still in progress Agents Love and Emerick left the Kernick apartment. They went to their automobile, which was parked on South Drexel Boulevard headed south behind Fred Washington's automobile, and placed the apartment of Fred Washington under surveillance. Approximately 5 to 15 minutes later they saw Fred Washington, whom they had known for several years, and another man, whom they testified was Fred's brother Leon, leave the Washington apartment and get into Fred Washington's automobile and drive away. Love and Emerick followed them. About an hour after the telephone conversation, Leon Washington came to the Kernick apartment with 483.5 grains of heroin. He was then and there arrested. Agent Heisig reported this to Love and Emerick, who then located and arrested Fred Washington.

The errors relied upon for reversal by the defendant-appellant Fred Washington arise out of the refusal of the District Court to exclude the evidence of the telephone conversation, insufficiency of the evidence, and alleged deprivation of defendant's constitutional rights in arresting him without probable cause and the introduction in evidence of the telephone conversation.

Mrs. Kernick called Fred Washington by telephone at Heisig's suggestion. She dialed KE 6-6460, which was the unlisted telephone number of the apartment where Fred Washington lived. When the telephone was answered Kernick told the agents she was then talking with Fred Wash-

ington. Heisig and Mattera listened to the entire conversation and testified that the voice of the person with whom Kernick talked was that of Fred Washington. This foundation having been laid, the telephone conversation was clearly competent. *U.S.* v. *White*, 7 Cir., 1956, 228 F. 2d 832, 835; *U.S.* v. *Carr*, 7 Cir., 1955, 219 F. 2d 876, 878-879; *U.S.* v. *Bocur*, 7 Cir., 1952, 194 F. 2d 297, 303-304; *Fabacher* v. *U.S.*, 5 Cir., 1936, 84 F. 2d 602, 604; *Morton* v. *U.S.*, 7 Cir., 1932, 60 F. 2d 696, 698.

The defendant-appellant predicates his claim of insufficiency of the evidence on the sole premise that his conviction "rests on an alleged conversation between one of the witnesses in the case and the defendant." Defense counsel has conceded in oral argument before this court that if Fred Washington was the person with whom Mrs. Kernick talked on the telephone he is guilty.

The evidence as to whether Fred Washington was that person is in conflict. Heisig testified that he was. The parties stipulated that Mattera would testify to the same facts as Heisig. Accordingly two witnesses, Heisig and Mattera, identified the voice of the man with whom Kernick had the telephone conversation as that of Fred Washington. Fred Washington testified that it was not he. Leon Washington testified that it was he who had talked with Kernick. At the request of the government, Kernick was called as a court's witness. She testified that it was not Fred Washington with whom she talked though, at one point in her testimony, she testified that she was not positive that it was not his voice that she heard.

The defendant-appellant argues that it would have been impossible for Heisig and Mattera, in the position occupied by them, to identify the voice as that of Fred Washington in view of the short duration of the conversation and the fact that they had never heard his voice before and were able to make such identification only after they talked with him the following morning. However, the trial court heard the testimony and observed the witnesses as they testified. It believed the witnesses Heisig and Mattera as against the defendants and the witness Kernick.

In determining if there is sufficient evidence to support a conviction, it is not the role of an appellate court to weigh conflicting testimony. The weight to be given and the credibility to be attached to the testimony of the witnesses is a matter for determination by the trier of the facts. *U.S.* v. *Cook*, 7 Cir., 1950, 184 F. 2d 642, 644; *U.S.* v. *Detente*, 7 Cir., 1952, 199 F. 2d 286, 288; *U.S.* v. *White*, 7 Cir., 1956, 228 F. 2d 832, 833; *U.S.* v. *Green*, 7 Cir., 1957, 246 F. 2d 155, 158.

The undisputed evidence is that Kernick dialed the unlisted telephone in the Fred Washington apartment. When a man answered Kernick was asked by one of the agents "[i]s this Fred?". She answered "yes" and the telephone conversation continued. Just as soon as Kernick said it was Fred Washington with whom she was talking Love and Emerick left the Kernick apartment and took up surveillance of the Fred Washington apartment which was two or three doors to the south. In about 5 to 15 minutes Fred Washington came out of his apartment. With those undisputed facts in evidence before the trial court we cannot say that it erred in believing Heisig and Mattera over the defendants and Kernick.

The trial judge could well believe from the evidence that Fred Washington was the person with whom Mrs. Kernick talked and, therefore, with the concession that Fred Washington is guilty if the proof established he was that person, the evidence is sufficient to sustain the finding of the District Court that Fred Washington was guilty beyond a reasonable doubt.

The contention of the defendant-appellant, Fred Washington that he was arrested without probable cause and thereby deprived of his constitutional rights is without merit. The uncontroverted facts pertaining to the occurrences on the evening of June 17, 1956 within the knowledge of the arresting officers were sufficient in themselves to warrant a man of reasonable caution to believe that a felony had been committed by Fred Washington. They had "a reasonable ground for belief of his guilt" and had

probable cause sufficient to make the arrest. *Brinegar* v. *U.S.*, 1949, 338 U.S. 160, 175-176.

Moreover, subsequent to his arrest the Grand Jury investigated and returned the indictment in the case at bar. He was arrested on a bench warrant issued on the return of the indictment and released on bond conditioned on his appearance for trial on the offenses charged.

It is well settled law that one may be arrested "'by persons without any warrant, or without any previous complaint, and brought before a proper officer, and this may be in some sense said to be 'without due process of law.' But it could hardly be claimed, that after the case had been investigated and the defendant held by the proper authorities to answer for the crime, he could plead that he was first arrested 'without due process of law.'" *Ker* v. *Illinois*, 1886, 119 U.S. 436, 440.

Accordingly he can not be heard to complain as to his first arrest. However, we have held that there was probable cause for his arrest on June 17, 1956 and he was not, therefore, deprived of his constitutional rights.

The judgment is AFFIRMED.

DUFFY, *Chief Judge*, dissenting:

I respectfully dissent. I am inclined to believe that the natural abhorrence that all good citizens must feel toward those engaged in the illicit narcotic business, has caused the majority of this panel to reach an erroneous conclusion.

No matter how vile or disgusting the charged criminal offense may be, the defendant thus charged still must be convicted by evidence that is convincing beyond a reasonable doubt. The burden upon the Government is unchanged. In my judgment, in the case at bar, the Government has failed to meet the obligation which rested upon it.

No narcotics were found in the possession of defendant, Fred Washington. He had no previous record of violation

of the narcotics laws. The conviction of Fred Washington must stand or fall upon his identification by the sound of his voice. Neither agent ever had heard his voice before, yet, after his arrest on the following day, these agents claimed that the voice they then heard was the same voice they had heard the day before over the telephone.

In the opinion herein, the majority sets forth what it calls "uncontroverted facts" but Mrs. Kernick testified she did not speak to Fred Washington on the phone. Further, Leon Washington, a brother of Fred, testified that he was the one who answered the phone and, of course, it was he who delivered the narcotics. We held in *United States* v. *Bucur*, 194 F. 2d 297, 304, that the representation of one party to a telephone conversation that he conversed with another was, in itself, an insufficient proof of authentication.

I concede that ordinarily, where the evidence is conflicting, we must accept that which is most favorable to the Government, and I also recognize the rule that the trier of the facts is the sole judge of the credibility of witnesses. However, there are rare occasions when the physical facts of a situation are such as to make the oral testimony utterly unbelievable.

The agents "suggested" to Mrs. Kernick that she call a certain telephone number and ask for Fred Washington. She did call the number. Apparently she talked in the usual manner with the telephone receiver at her ear. The conversation consisted of not more than thirty-five words, which ordinarily would consume about twelve seconds of time. It is the unbelievable testimony of the agents that as Mrs. Kernick was telephoning, each agent got his head close enough to Mrs. Kernick's head so that he not only heard the voice on the other end, but heard it clearly and distinctly enough so that on the following day he was able to recognize the voice he had heard on the telephone as belonging to Fred Washington.

To me such an alleged performance was impossible. Maybe a two-faced Janus who was a contortionist, might

have manipulated one of his right ears and one of his left ears so that both of the ears were touching a telephone receiver already occupied by the ear of a third person, but I doubt it. In the case at bar, we have the picture of not one but two agents getting close enough to a telephone receiver already at the ear of Mrs. Kernick, so that they not only heard a voice they never had heard before, but were able to take note of the quality and the sound of the same, and readily identify that voice the following day.

After the telephone call, and before seeing Fred Washington, agent Heisig ordered that Fred Washington be arrested. Heisig testified "I ordered the arrest, but I was not certain that the defendant was the same person to whom the phone call was directed."

Disregarding, as we should, the identification of defendant, Fred Washington, by his voice, there is no competent or substantial evidence in this record to sustain the verdict of guilty. See *Abrams et al.* v. *United States,* 250 U.S. 616, 619.

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No. 1012

In the Supreme Court of the United States

OCTOBER TERM, 1957

FRED WASHINGTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals (R. 106-111; Pet. App. 1-7) are not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 17, 1958 (R. 112). The petition for a writ of certiorari was filed on May 16, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioner's conviction.

2. Whether alleged illegality of an arrest would warrant reversal of the conviction where no evidence was obtained at the time of arrest.

STATEMENT

Petitioner and his brother, Leon Washington, were charged in a two-count indictment returned in the United States District Court for the Northern District of Illinois with (1) the unlawful purchase of 486 grains of heroin not in the original stamped package, in violation of 26 U.S.C. 4704(a); and (2) the unlawful concealment of this heroin, knowing that it had been imported into the United States contrary to law, in violation of 21 U.S.C. 174 (R. 3-4). In a trial before the court without a jury (R. 4-5), petitioner was found guilty on both counts and sentenced generally to imprisonment for two years and a fine of $1.00 (R. 98-100).[1] On appeal the conviction was affirmed (R. 100-101, 112).

The pertinent evidence adduced at the trial may be summarized as follows:

On June 17, 1956, four federal narcotics agents were in the apartment of Mrs. Ardie Kernick at 4615½ South Drexel Boulevard in Chicago (R. 13, 39, 59, 77). Agent Heisig suggested that Mrs. Kernick should telephone petitioner at his nearby apartment at 4627 South Drexel, where the unlisted number (KE 6-6460) was in the name of petitioner's wife (R. 23-24, 35-37).[2] After Mrs. Kernick dialed this number at 7:25 p.m.

[1] Leon Washington was also found guilty and is now serving his sentence (R. 98; Pet. App. 1).

[2] Agent Emerick knew about petitioner through "anonymous phone calls, and from other people whom we had arrested for narcotic violations" (R. 57).

and began speaking, one of the agents put his hand over the telephone and asked her if this was Fred Washington (petitioner) talking. Mrs. Kernick replied that it was (R. 18, 24, 71, 54). After dialing, Mrs. Kernick had tilted the receiver. Agents Heisig and Mattera both had an ear next to the telephone and heard the conversation between Mrs. Kernick and petitioner (R. 14, 16, 70, 77-78). According to the government's evidence this conversation was as follows (R. 17, 76):

> Mrs. Kernick: Hello. Is Fred there?
> Petitioner: Yes, this is Fred. Who is this?
> Mrs. Kernick: This is Dee, Baby.
> Petitioner: Yes.
> Mrs. Kernick: I would like to get a couple; can you get me some?
> Petitioner: I can get you a couple.
> Mrs. Kernick: How long will it take?
> Petitioner: About an hour or so.
> Mrs. Kernick: Okay.

Agents Heisig and Mattera did not know petitioner's voice at this time, but did recognize it the next day at 10:30 a.m., when petitioner was interviewed at police headquarters. The agents testified that it was the same voice they had heard in the telephone conversation the previous evening (R. 24, 63-64, 76).

Upon hearing Mrs. Kernick state that the other party to the telephone call was the petitioner, agent Heisig told agents Love and Emerick to arrest petitioner. These agents left to begin surveillance of petitioner's apartment at 4627 South Drexel (R. 25, 40, 59, 66, 71). About 10 or 15 minutes later they saw petitioner and Leon Washington leave the apartment house

and drive away in petitioner's Cadillac (R. 40, 55, 59-60, 65-66). Petitioner and Leon Washington then picked up a third man, and returned to the vicinity of petitioner's apartment (R. 60, 66-67). The agents observed Leon Washington leave the Cadillac and drive away in a green Pontiac. In the meantime the Cadillac left (R. 41, 61).

About ten minutes later and one hour after the telephone call, Leon Washington appeared at Mrs. Kernick's apartment with two packages of heroin hydrochloride. He was arrested by agent Heisig (R. 18-20, 9-12, 90). Shortly thereafter Heisig saw agents Emerick and Love near the apartment and informed them of Leon Washington's arrest. They then drove around and found petitioner parking his Cadillac on 31st Street near Indiana (R. 21, 41-42, 61-62, 69). The agents arrested petitioner without a warrant at about 9:00 p.m. (R. 42, 45, 56, 62, 72).

There was a conflict between the testimony of government witnesses and witnesses for the defense. Petitioner denied that he had received the telephone call on June 17, 1956 from Mrs. Kernick (R. 91). Leon Washington testified that he was the person who had this telephone conversation, after which he purchased the heroin and brought it to Mrs. Kernick's apartment, with the hope that he, an addict, would be given a "fix" (R. 94-96). Mrs. Kernick, under indictment at the time of the trial, testified as a witness called by the court. She admitted that she had a telephone conversation substantially similar to that shown by the government evidence, but that the person on the other end of the line was not the petitioner, with whose telephone voice she was familiar (R. 80 81, 82, 89). She stated

that, when she was dialing, agent Heisig put his ear to the telephone, but that the other agent did not do so (R. 89).

ARGUMENT

Petitioner contends that the trial judge should not have credited the government evidence as to petitioner's telephone conversation with Mrs. Kernick, and that therefore the evidence was insufficient to support his conviction. It is, however, not inherently incredible that the two agents should be able to hear the telephone conversation by standing close to the tilted receiver.[3] It is a matter of common knowledge that, when a telephone receiver is so held, it is often possible for a bystander several feet away to hear the words spoken from the other end of the line. Only a short time elapsed from the overhearing of the telephone voice by the agents in the evening, and their direct audition of petitioner's voice the next morning. Cf. *Fabacher* v. *United States*, 84 F. 2d 602, 604 (C.A. 5). It is also significant that Mrs. Kernick, who was familiar with petitioner's voice, informed the agents at the time of the conversation that the voice on the other end of the line was the petitioner's. And since petitioner's voice was properly identified as the party called, testimony as to the conversation was admissible. Cf. *Rathbun* v. *United States*, 355 U.S. 107; *United States* v. *White*, 228 F. 2d 832, 834-835 (C.A. 7); *United States* v. *Carr*, 219 F. 2d 876, 878-879 (C.A. 7); *Morton* v. *United States*, 60 F. 2d 696, 698 (C.A. 7), certiorari denied, 288 U.S. 607.

[3] Even if the court believed that only agent Heisig (and not Mattera) heard the conversation, that would have been sufficient.

The court was not obliged to credit petitioner's witnesses or Mrs. Kernick. Petitioner's interest and motive for denial of the conversation was obvious. The case against Leon Washington did not depend on the telephone conversation. Consequently, Leon may well have thought he had nothing to lose by taking the blame for his brother. Mrs. Kernick's testimony was of doubtful credibility, since on the day after the telephone conversation she made a written statement to the police acknowledging that her conversation had been with petitioner, and later recanted this statement at the trial (R. 83-84).

Both courts below having found the evidence sufficient to support conviction, there is no occasion for further review of the evidence by this Court. See *Kann* v. *United States*, 323 U.S. 88, 93; *United States* v. *Johnson*, 319 U.S. 503, 518; *Delaney* v. *United States*, 263 U.S. 586, 589-590.

2. There is no merit to petitioner's contention that his conviction should be reversed on the ground that his arrest was illegal as having been made without probable cause (Pet. 11-16).

Prior to the time of petitioner's arrest the agents had probable cause, arising from the facts and circumstances within their knowledge, to warrant reasonable belief that petitioner had committed a felony. Cf. *Brinegar* v. *United States*, 338 U. S. 160, 175-176. At the time of the telephone conversation ordering delivery of the heroin, Mrs. Kernick announced that she was talking to petitioner. Shortly thereafter petitioner left his apartment with his brother and the brother came to deliver narcotics to Mrs. Kernick. It was only after obtaining information as to delivery

that the agents found petitioner and arrested him. By that time, there was probable cause for believing that petitioner had been a participant in the sale and therefore subject to arrest on probable cause to believe he had committed a felony.

Moreover, there is no contention that the allegedly illegal arrest operated in some way (*e.g.*, by use of a coerced confession or evidence seized incidental to petitioner's arrest) to deprive petitioner of a fair and impartial trial. Even if it be assumed *arguendo* that the arrest was illegal, this is beside the point since the arrest did not in any manner bring about, or taint, the conviction. Cf. *Frisbie* v. *Collins*, 342 U.S. 519, 522; *Ker* v. *Illinois*, 119 U.S. 436.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE 1958.

☆ U. S. GOVERNMENT PRINTING OFFICE 1958 884602